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In the Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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112 pp

QUESTION PRESENTED

Whether 8 U.S.C. 1252(a), which allows the Attorney General, pending determination of deportability of an alien, to release the alien under bond "containing such conditions as the Attorney General may prescribe," permits a condition that forbids the alien to engage in unauthorized employment pending determination of deportability.

PARTIES TO THE PROCEEDING

Petitioners, defendants below, are the Immigration and Naturalization Service; Alan C. Nelson, Commissioner of the Immigration and Naturalization Service; and Edwin Meese III, Attorney General of the United States. Respondents, plaintiffs below, are National Center for Immigrants' Rights, Inc., American Friends Service Committee, El Rescate ("The Rescue"), Central American Refugee Center, El Concilio Manzo, Willamette Valley Immigration Project, Southern California Ecumenical Council, Centro Presente, Inc., Tucson Ecumenical Council, Hermandad Nacional Mexicana, Coalition for Visas and Rights for the Undocumented, Centro Para Inmigrantes de Houston, International Institute of Boston, Center for Immigrants Rights, Imperial Valley Immigration Project, United Automobile, Aerospace and Agricultural Implement Workers of America Local 645, Santos Adalberto Lopez-Duran, Julio Fernando Lorine-Garcia, Raphael Antonio Perez, Raul Armando Marroquin, Ricardo Delgado Osegueda (or Oseguena), Mirza Odilia Hernandez Diaz, Maximiliano Martinez Oriana (or Orellana), Rosa Maria Tovar Rivas (or Tobar Rivas), Dennis Gillermo Vanegas, Antonio Mendoza Romero, Migel (or Miguel) Angel Gomez Vasquez (or Gomez-Vasquez), Fidel Angel Henriquez Duran, Daniel Antonio Garcia Reyes, Ana Berta Martinez, Dionisio Navarette Marlos (or Merlos), and Jane Doe I (an alien who claims to be deterred from filing for benefits with INS because of fear that the regulations at issue would result in her indefinite detention).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory and regulatory provisions involved	2
Statement	2
Reasons for granting the petition	13
Conclusion	30
Appendix A	1a
Appendix B	11a
Appendix C	26a
Appendix D	27a
Appendix E	40a
Appendix F	50a
Appendix G	63a

TABLE OF AUTHORITIES

Cases:

Califano v. *Yamasaki*, 442 U.S. 682 (1979)	14
Carlson v. *Landon*, 342 U.S. 524 (1952)	5, 6, 26
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984)	20, 24
Chew, In re, 18 I. & N. Dec. 262 (BIA 1982)	26
Consumer Product Safety Commission v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980)	20
De Canas v. *Bica*, 424 U.S. 351 (1976)	27, 28
Department of Transportation v. *Paralyzed Veterans of America*, No. 85-289 (June 27, 1986)	20
Elkins v. *Moreno*, 435 U.S. 647 (1977)	2
INS v. *Delgado*, 466 U.S. 210 (1984)	14, 15
INS v. *Hector*, No. 86-21 (Nov. 17, 1986)	20
INS v. *Jong Ha Wang*, 450 U.S. 139 (1981)	24
INS v. *Phinpathya*, 464 U.S. 183 (1984)	20

Cases—Continued: Page

INS v. *Rios-Pineda*, 471 U.S. 444 (1985) 16
Northeast Bancorp Inc. v. *Board of Governors*, 472 U.S. 159 (1985) 24
Northwest Airlines v. *Transport Workers*, 451 U.S. 77 (1981) 20
Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 20
Saxbe v. *Bustos*, 419 U.S. 65 (1974) 17
Steadman v. *SEC*, 450 U.S. 91 (1981) 20
Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883 (1984) 14, 15, 27
Toscano-Rivas, In re, 14 I. & N. Dec. 550 (A.G. 1974) 12, 24, 26, 27
United States v. *Boyle*, 469 U.S. 241 (1985) 24
United States v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985) 24
Vea, In re, 18 I. & N. Dec. 171 (BIA 1981) 13, 26
Young v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986) 24

Statutes and regulation:

Farm Labor Contractor Registration Act, 7 U.S.C. 2041 *et seq.* 28
Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, 8 U.S.C. (& Supp. III) 1101 *et seq.* ... 2, 7
§ 103(a), 8 U.S.C. 1103(a) ..... *passim*
§ 201(b), 8 U.S.C. 1151(b) 4
§ 203(a)(1), 8 U.S.C. 1153(a)(1) 3
§ 203(a)(2), 8 U.S.C. 1153(a)(2) 3
§ 203(a)(3), 8 U.S.C. 1153(a)(3) 3
§ 203(a)(4), 8 U.S.C. 1153(a)(4) 3
§ 203(a)(5), 8 U.S.C. 1153(a)(5) 3
§ 203(a)(6), 8 U.S.C. 1153(a)(6) 3
§ 203(a)(7), 8 U.S.C. 1153(a)(7) 3
§ 212(a)(14), 8 U.S.C. 1182(a)(14) 2, 3, 4, 5, 72a
§ 241(a), 8 U.S.C. 1251(a) 5, 73a
§ 241(a)(1), 8 U.S.C. 1251(a)(1) 2, 5
§ 241(a)(9), 8 U.S.C. 1251(a)(9) 5
§ 242(a), 8 U.S.C. 1252(a) ..... *passim*
§ 245(c), 8 U.S.C. 1255(c) 4
§ 245(c)(2), 8 U.S.C. 1255(c)(2) 4
§ 264(e), 8 U.S.C. 1304(e) 17

Statutes and regulation—Continued: Page

Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3360 ..... 18, 28
§ 274a(h)(2) 28
§ 274a(h)(3) 29
Internal Security Act of 1950, ch. 1024, 64 Stat. 987 ..... 7, 26
§ 23, 64 Stat. 1011 ..... 7, 11, 12, 22, 23
8 U.S.C. (1940 ed.) 156 ..... 5, 7, 22
8 U.S.C. 1304(e) 17
18 U.S.C. (Supp. II) 3142(c) 21
18 U.S.C. (Supp. II) 3142(c)(1) 21
18 U.S.C. (Supp. II) 3142(g) 21
18 U.S.C. (Supp. II) 3142(h) 21
18 U.S.C. 3146 21
Pub. L. No. 89-236, § 10(a), 79 Stat. 917 4
Pub. L. No. 94-571, 90 Stat. 2703:
§ 5, 90 Stat. 2705 4
§ 6, 90 Stat. 2705-2706 4
8 C.F.R.:
Section 103.6 ..... 26, 63a
Section 103.6(a)(2) 12
Section 103.6(a)(2)(ii) (1983) 7
Section 103.6(a)(2)(iii) 8
Section 109.1 ..... 12, 67a
Section 109.1(a)(5) 17
Section 109.1(a)(6) 17
Section 109.1(b)(1)-(7) (1983) 8
Section 109.1(b) 18
Section 109.1(b)(2) 9
Section 109.1(b)(8) 8
Pt. 208 9
Section 208.8(b) 18
Section 211.1(b) 17
Section 212.1 17
Section 212.1(c) 17
Section 214.1(e) 5

Miscellaneous: Page

48 Fed. Reg. (1983):
p. 8820 8
pp. 8820-8821 8
pp. 51142-51144 9
p. 51143 9
p. 51144 8
H.R. 10, 81st Cong., 1st Sess. (1949) 5, 6, 7, 22
H.R. Rep. 1192, 81st Cong., 1st Sess. (1949) 6, 23, 24
H.R. Rep. 1365, 82d Cong., 2d Sess. (1952) 2, 7
H.R. Rep. 94-1553, 94th Cong., 2d Sess. (1976) 4, 5
S. Rep. 2239, 81st Cong., 2d Sess. (1950) 6, 23, 24
S. Rep. 748, 89th Cong., 1st Sess. (1965) 4

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, its Commissioner Alan C. Nelson, and Attorney General Edwin Meese III, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 791 F.2d 1351. The opinion of the district court (App., *infra*, 11a-25a) is reported at 644 F. Supp. 5. A prior opinion of the court of appeals affirming the issuance of a preliminary injunction (App., *infra*, 27a-39a) is reported at 743 F.2d 1365. The district court's prior opinion (App., *infra*, 40a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1986. A petition for rehearing with suggestion for rehearing en banc was denied on September 23, 1986 (App., *infra*, 26a). On December

10, 1986, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including January 21, 1987.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 103(a), 212(a)(14), 241(a)(1), and 242(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1103(a), 1182(a)(14), 1251(a)(1), and 1252 (a); and 8 C.F.R. 103.6 and 109.1 (1983) and the proposed amendments, 48 Fed. Reg. 51142-51144 (1983), are reproduced at App., *infra*, 50a-74a.

STATEMENT

1. a. The Immigration and Nationality Act of 1952, 8 U.S.C. (& Supp. III) 1101 *et seq.* (the Act or INA), is a comprehensive statutory scheme intended to cover all aspects of admissions of aliens to the United States, whether for business or pleasure, or for seeking permanent resident status. See H.R. Rep. 1365, 82d Cong., 2d Sess. 27 (1952). See generally *Elkins* v. *Moreno*, 435 U.S. 647, 664-665 (1978). In particular, the statute creates an elaborate scheme that conditions entry of aliens into the United States on compliance with limitations directly related to employment in the United States, thus reflecting one of Congress's consistent policies to

> provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country.

H.R. Rep. 1365, *supra*, at 51. To implement this policy, the Act conditions entry of each immigrant alien who intends to work in the United States, with

the exception of close relatives of U.S. citizens and lawful permanent resident aliens,[1] on the alien's obtaining from the Secretary of Labor a certificate entitling him or her to work in the United States (8 U.S.C. 1182(a)(14)):

> (a) Except as otherwise provided in this chapter, the following classes shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *
>
> (14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified * * *, and available at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

Congress's intent to protect American labor has been expressed repeatedly, and the protections have been increased in succeeding amendments to the Act.

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[1] Section 1182(a)(14) does not apply to sons or daughters of U.S. citizens (8 U.S.C. 1153(a)(1) and (4)), spouses, unmarried sons or daughters of lawful permanent resident aliens (8 U.S.C. 1153(a)(2)), or brothers or sisters of citizens (8 U.S.C. 1153(a)(5)). Section 1182(a)(14) states that it "shall apply to preference immigrant aliens described in section 1153(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(7) of this title." The immigrant aliens to which this sentence refers include all immigrants who may be allotted visas under the numerical limitations except the relatives of citizens or permanent residents specifically listed in 8 U.S.C. 1153(a)(1), (2), (4), and (5).

In 1965, Congress shifted primary responsibility for obtaining certification from the Secretary of Labor to the immigrant seeking such clearance. Pub. L. No. 89-236, § 10(a), 79 Stat. 917. One stated intent of the amendment was to strengthen safeguards for American workers: "Simultaneous with the abolition of national quotas, controls to protect the American labor market from an influx of both skilled and unskilled foreign labor are strengthened." See S. Rep. 748, 89th Cong., 1st Sess. 15 (1965).

In 1976, in eliminating differences between the application of the labor certification provision to aliens from the Eastern and Western Hemispheres, Congress again recognized that "[t]he labor certification provision set forth in [8 U.S.C. 1182(a)(14)] is intended to protect the domestic labor force." H.R. Rep. 94-1553, 94th Cong., 2d Sess. 10 (1976); see Pub. L. No. 94-571, § 5, 90 Stat. 2705. Congress also modified the provision authorizing adjustment of status from nonimmigrant to permanent resident alien by providing, in 8 U.S.C. 1255(c)(2), that aliens who accept unauthorized employment before filing their adjustment applications are ineligible for adjustment of status. Pub. L. No. 94-571, § 6, 90 Stat. 2705-2706.[2] By this modification, Congress explained that it was adding a means to enforce a condition on entry that already applied to all aliens, *i.e.*, that they not engage in unauthorized employment: "The Committee believes that [8 U.S.C. 1255(c)(2)] would deter many nonimmigrants from violating the conditions of their admission by obtaining

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[2] There are limited exceptions, such as the one for "immediate relatives" as defined in 8 U.S.C. 1151(b), who may become permanent residents despite having accepted employment while in nonimmigrant status. 8 U.S.C. 1255(c).

unauthorized employment." H.R. Rep. 94-1553, *supra*, at 12.

Aliens who enter the United States for the purpose of engaging in unauthorized employment are excludable and deportable. Aliens who violate the terms and conditions of their entry by engaging in unauthorized employment are deportable. 8 U.S.C. 1182(a)(14), 1251(a)(1) and (9); 8 C.F.R. 214.1 (e).

b. The Act provides that the Immigration and Naturalization Service (INS) may arrest and detain deportable aliens for the purpose of effecting deportation. 8 U.S.C. 1251(a), 1252(a). In addition, 8 U.S.C. 1252(a) provides that the alien may be retained in custody or released on bond or conditional parole pending a determination of deportability and that the Attorney General may prescribe conditions on the release bond.

Before 1950, the statute permitted release on bond "conditioned that such alien be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody" (8 U.S.C. (1940 ed.) 156). In 1949, Congress considered, but did not enact, a bill (H.R. 10, 81st Cong., 1st Sess.) that was intended, among other things, to make it easier for the Attorney General to detain some aliens without bond (see generally *Carlson* v. *Landon*, 342 U.S. 524, 538-541 (1952)). That bill would also have amended former 8 U.S.C. 156 to provide that, in the case of release on bond, it would be "among the conditions of any such bond * * * that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending against the charge or charges under which he was taken into custody." The reports of both

Houses of Congress on this bill stated (H.R. Rep. 1192, 81st Cong., 1st Sess. 6 (1949); S. Rep. 2239, 81st Cong., 2d Sess. 5 (1950) (emphasis added)):

> The bill further provides that *among the conditions* of any bond exacted, * * * there shall be a condition that the alien shall be produced when required for defense against the charges upon which he appears to be deportable * * *. These provisions, of course, enumerate *only one* of the conditions which is mandatory in the bond * * *. *The bill intends that the Attorney General shall have full discretion in imposing any other conditions or terms in the bond * * * which he may see fit to include.* Thus, a man released on bond might have as a condition of the bond that he also be subject to make periodic reports to the immigration officials as to his whereabouts and furnish other desired information. Or a bond might provide as one of its conditions that upon demand by the Attorney General the existing bond shall be surrendered and a new bond in greater or lesser amount or other conditions shall be furnished. *The bill intends that the Attorney General shall have untrammeled discretion to impose such conditions or terms as he sees fit in releasing an alien under bond * * * pending final determination of the deportability of the alien * * *.*[3]

Despite the failure of H.R. 10 to pass, it was, as the Court recognized in *Carlson* v. *Landon*, 342 U.S.

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[3] The House report also stated more generally that one purpose of the bill was to "return without doubt to the political (executive) branch of the Government certain functions in connection with the exclusion and expulsion of aliens which historically have been vested in that branch, rather than the judiciary" (H.R. Rep. 1192, *supra*, at 4).

at 538, the progenitor of Section 23 of the Internal Security Act of 1950, ch. 1024, 64 Stat. 1011. Section 23 specifically amended former 8 U.S.C. 156 to contain the exact language that H.R. 10 would have enacted: "It shall be among the conditions of any such bond * * * that the alien shall be produced, or will produce himself when required to do so for the purpose of defending against the charge or charges under which he was taken into custody * * *."

In 1952, when Congress comprehensively revised the immigration laws (ch. 477, 66 Stat. 163), former 8 U.S.C. 156 was replaced by Section 242(a) of the new Act, now codified as 8 U.S.C. 1252(a). That section provides that an alien may be released on bond "with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe." The language specifying that "[i]t shall be among the conditions" that the alien appear was not carried into the statute, but the legislative history indicates that Section 242(a), "in general, follows the procedure established by section 23 of the Subversive Activities Control Act of 1950" (H.R. Rep. 1365, 82d Cong., 2d Sess. 57 (1952)).[4]

2. Before INS promulgated the regulation challenged in this action, the regulation governing release on bond pending deportation proceedings permitted release to be conditioned on the alien's refraining from unauthorized employment, but only after a cumbersome procedure whereby the district director had to obtain prior approval of an INS regional commissioner. 8 C.F.R. 103.6(a)(2)(ii) (1983). In

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[4] The Subversive Activities Control Act of 1950 is Title I of the Internal Security Act of 1950, and references to Section 23 of either Act are to the same provision.

March 1983, INS proposed for comment two changes to the regulations governing release on bond. See 48 Fed. Reg. 8820-8821 (1983). The proposed changes were intended to simplify the procedure for conditioning release on bond, by including a condition prohibiting unauthorized employment in every "appearance and delivery bond in connection with a deportation proceeding or bond posted for release of an alien in exclusion proceedings, unless upon application by the alien the District Director determines that employment is appropriate" (*ibid.*). INS also proposed to give the district directors general authority to grant any alien released on bond temporary employment authorization if justified by certain specified factors.[5] INS explained that the revisions were proposed to further the policy of the Act to protect American workers (48 Fed. Reg. 8820 (1983)):

> These revisions are consistent with the general principle that employment of aliens in the United States is to be strictly controlled to safeguard

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[5] The regulation set forth factors to be considered in the exercise of discretion concerning whether to grant work authorization, including the safeguarding of employment opportunities for American citizens, prior violations of the immigration laws by the alien, whether an American citizen or lawful permanent resident is dependent on the alien for support, and whether there are other equities that should be considered. See 48 Fed. Reg. 51144 (1983) (8 C.F.R. 103.6 (a) (2) (iii) and 8 C.F.R. 109.1(b) (8)); App., *infra*, 60a-62a. The authority proposed to be given to district directors under these regulations would be in addition to the district directors' preexisting authority (8 C.F.R. 109.1(b) (1)-(7) (1983)) to grant work authorization to aliens who are in certain specified statuses or have applied for or been granted certain specified benefits.

the interest of U.S. citizens and permanent resident aliens.

Following receipt of many comments from the public, INS published its final regulation in November 1983 with an explanation addressing the principal concerns raised in the comments. 48 Fed. Reg. 51142-51144 (1983); App., *infra*, 50a-62a. Responding to the most significant misapprehension expressed, INS explained that the regulation would not diminish any employment authorization that an alien already had because it barred only *unauthorized* employment. Thus, it would not affect citizens and permanent resident aliens who have authorization to work. In addition, the regulation would not affect bona fide asylum applicants who had filed nonfrivolous applications since a different regulation (8 C.F.R. Pt. 208; see also 8 C.F.R. 109.1(b)(2)) governs employment authorization for such persons. The primary effect of the regulation was to place on the alien who wished to avoid a no-unauthorized-work rider the burden of seeking employment authorization from the district director. 48 Fed. Reg. 51143 (1983).[6] By placing the burden of seeking work authorization on the alien, INS intended to remove an economic incentive for illegal entry for the purpose of engaging in unlawful employment and to remove an incentive to delay deportation proceedings when an alien is apprehended. Acknowledging that fewer bonds might be written and that more aliens might be detained in custody under the new regulation, INS stated that these were acceptable costs in the effort to safeguard employ-

[6] Although the regulation placed the burden on such an alien to seek employment authorization, the regulation also provided a new, additional basis to obtain such authorization from the district director. See note 5, *supra*.

ment for U.S. citizens and permanent resident aliens. *Ibid.*

3. On December 6, 1983, one day before the new regulations were to take effect, plaintiffs filed this action challenging the validity of the regulations on a variety of statutory and constitutional theories.[7] Ten days later the district court issued a nationwide preliminary injunction prohibiting implementation of the regulations (App., *infra*, 40a-49a). The basis for this ruling was that plaintiffs had a "fair chance" of success on their arguments that the statute, 8 U.S.C. 1252(a), does not authorize a condition on release bonds that is unrelated to ensuring the alien's appearance and that the regulations deprive aliens of their due process rights by denying them the right to work until deportability is finally determined (App., *infra*, 46a).

On INS's appeal from the grant of the preliminary injunction, the court of appeals affirmed in part and reversed in part and remanded the case to the district court (App., *infra*, 27a-39a). The court held that a nationwide injunction was improper in the absence of class certification and held that the scope of relief must be limited to the named plaintiffs unless the district court, on remand, certified a class. The

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[7] Plaintiffs named in the original complaint were 13 nonprofit organizations providing free legal services to aliens with immigration problems, a local United Auto Workers Union affiliate, six named aliens held in detention, and one unnamed alien who claimed to be deterred from filing for benefits by fear that the new regulation would result in indefinite detention (Clerk's Record, Docket Entry 1, at 5-9). In an amended complaint, filed on December 16, 1983, one of the alien plaintiffs held in detention was omitted and 10 additional alien plaintiffs were named (E.R. 8-17). Four of the additional plaintiffs alleged that a "no-work" condition had been included in their release bonds; six alleged that they were then currently detained.

court of appeals agreed with the district court, however, that the plaintiffs had a "fair chance" of succeeding on the merits of their statutory argument and affirmed the injunction. In support of this assessment of the merits, the court asserted that the Act is only " 'peripheral[ly] concern[ed] with employment of illegal entrants' " (*id.* at 36a) and that reference to protecting the American workforce could not, therefore, be a legislative scheme justifying imposition of the "no-unauthorized-work" release condition. In addition, the court of appeals stated that the regulation "does away with individualized determinations" (*id.* at 28a) and concluded that "[t]he discretion of the Attorney General to impose a condition on a particularized showing in an individual case is quite different from the authority to do so by a blanket rule" (*id.* at 36a-37a).

On remand, the district court certified a nationwide class and entered a nationwide permanent injunction (App., *infra*, 11a-25a). The sole ground for the district court's ruling was that the regulation exceeds the statutory authority granted in 8 U.S.C. 1252(a) to condition release on bond (App., *infra*, 14a, 25a). Although the court acknowledged that the condition prohibiting unauthorized employment does "further the broad purposes of the Immigration and Nationality Act" (*id.* at 15a), it nevertheless held that bond conditions must be limited to the sole purpose of ensuring the appearance of the alien at deportation proceedings (*id.* at 18a-19a, 22a-23a). The court also acknowledged that the plain language of the statute "appears on its face to grant a great deal of discretion to the Attorney General in his decision on whether to release an alien under bond" (*id.* at 17a), but the court decided that the plain language must be construed in light of Section 23 of the Internal Security Act of 1950 and its legislative history.

Looking to the examples of bond conditions discussed in the legislative history of Section 23, the district court concluded that, because the only examples provided related to ensuring appearance, the Attorney General's discretion must be limited to such conditions (App., *infra*, 17a-19a). The district court refused to accord deference to the Attorney General's own interpretation of the statutory provision in *In re Toscano-Rivas*, 14 I. & N. Dec. 550 (A.G. 1974), on the ground that it did "not find *Toscano*[*-Rivas*] persuasive, especially in light of the ambivalent language which permeates that case" (App., *infra*, 19a). Repeating the statement of the court of appeals that the Act is only "'"peripheral[ly] concern[ed] with employment of illegal entrants,"'" the district court held that "the INA cannot serve as the 'legislative scheme' which authorizes the Attorney General, based upon the purpose of the protection of the domestic labor market, to impose no-work conditions in appearance and delivery bonds" (*id.* at 22a). The court also stated that the regulation "inherently precludes any individualized determination" (*id.* at 15a) and held that "the discretion of the Attorney General does not extend to the blanket imposition of a no-work condition on all aliens who are released on bond" (*id.* at 25a).[8]

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[8] The scope of the district court's injunction, which remains in effect, is not entirely clear. For example, it is not clear whether the district court intended to bar implementation of 8 C.F.R. 103.6(a)(2) only, or also enjoined implementation of simultaneously proposed changes, beneficial to aliens, in 8 C.F.R. 109.1. It is also unclear whether the district court intended to prohibit continued use of the prior version of the regulation, which permitted no-unauthorized-employment conditions on a case-by-case basis. The district court held that "the Attorney General's discretion to impose release conditions must be limited to those conditions which are related to

The court of appeals affirmed (App., *infra*, 1a-10a). Like the district court, the court of appeals acknowledged the breadth of the statutory language, but held that "legislative history, prior legislation, and case law limit the allowable conditions to those that tend to insure the appearance of the alien in future proceedings" (*id.* at 7a). The only support given for the court's statement is an observation that the examples of conditions in the legislative history relate to the Attorney General's ability to "maintain contact with and control over aliens" (*id.* at 7a-8a). The court reiterated its view that the Act is not primarily concerned with employment of aliens and that such a purpose, therefore, would not support the no-unauthorized-work condition on release (*id.* at 9a-10a). The court of appeals also endorsed the district court's reasoning that the Attorney General must proceed by "individualized determinations rather than the imposition of a blanket condition" (*id.* at 10a).

REASONS FOR GRANTING THE PETITION

The court of appeals has affirmed a nationwide injunction, thus "foreclosing [INS from] adjudication by a number of different courts and judges" (*Cali-*

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securing the alien's presence at future deportation proceedings" (App., *infra*, 22a-23a). That holding would preclude virtually all no-unauthorized-employment conditions. In Part II of its opinion, however, the court commented that "the INS has the authority 'in a *proper* case to impose a bond condition prohibiting unauthorized employment,' " and based its decision on a holding that "the discretion of the Attorney General does not extend to the blanket imposition of a no-work condition on all aliens who are released on bond pending future deportation proceedings" (App., *infra*, 25a, quoting, and adding emphasis to, *In re Vea*, 18 I. & N. Dec. 171, 174 (BIA 1981)). That second holding purports to invalidate only the 1983 regulation and not its predecessor.

fano v. *Yamasaki*, 442 U.S. 682, 702 (1979)) and forcing INS to seek the Court's review without the benefit of additional consideration in the lower courts. There will be no other opportunity to review this decision. In addition, the decision has considerable practical significance and is legally erroneous.

1. It cannot seriously be disputed that "[o]ne of the main reasons [aliens] come [to the United States illegally]—perhaps *the* main reason—is to seek employment" (*INS* v. *Delgado*, 466 U.S. 210, 223 (1984) (Powell, J., concurring)), and the Court has recognized that "[a] primary purpose in restricting immigration is to preserve jobs for American workers" (*Sure-Tan, Inc.* v. *NRLB*, 467 U.S. 883, 893 (1984)). In its effort to implement the alien employment restrictions in the Act, INS is continually seeking reasonable enforcement mechanisms that will discourage illegal immigration by removing the economic incentive for aliens to enter or remain in this country without proper authorization. Justice Powell has observed that the government interest in efficient techniques to diminish that economic incentive can be "enormous" (*Delgado*, 466 U.S. at 223 (Powell, J., concurring)).

The regulation invalidated by the court of appeals is one such enforcement mechanism. The regulation requires an alien who is apprehended on probable cause to believe that he or she is unlawfully in this country, and who is released on bond while awaiting a determination of deportability, to refrain from engaging in unauthorized employment. By doing so, the regulation imposes no obligations on such an alien other than the one that already exists because of the prohibition on unauthorized employment in the Act.[9]

[9] In addition, far from doing away with individualized determinations as the courts below claimed, the regulation gives

What it adds is not a new obligation but a new sanction—revocation of bond. For aliens who have been apprehended and who have no valid defense in the deportation proceedings, no other effective sanction exists under present law, since the usual sanction for engaging in unauthorized employment—deportation—has become a foregone conclusion by the time they are released on bond.

In a variety of contexts related to the enforcement of alien employment restrictions, the Court has recognized the importance to the government of similar reasonable enforcement mechanisms. For example, in *INS* v. *Delgado*, *supra*, the Court rejected a Fourth Amendment challenge to factory surveys that INS conducted pursuant to warrants based on probable cause to believe that illegal aliens were employed on the premises. As Justice Powell observed, factory surveys "enabl[e] the INS with relatively few agents to diminish the incentive for the dangerous passage across the border and to apprehend large numbers of those who come. Clearly, the Government interest in this enforcement technique is enormous." 466 U.S. at 223 (concurring opinion) (footnote omitted).

In *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), the Court sustained the applicability of the National Labor Relations Act's protections against unfair employment practices to undocumented alien employees. The Court reasoned (467 U.S. at 893-894) that

> [a]pplication of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not

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every alien released on bond an opportunity to persuade the district director that employment—otherwise prohibited by the Act itself—is appropriate (see pages 8-9 & notes 5 & 6, *supra*).

> subject to the standard terms of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.

The effect of the challenged regulation is similar to the effect of factory surveys or of applying the NLRA to undocumented alien workers: it is designed to discourage entry for the purpose of engaging in unauthorized employment and to discourage aliens who are apprehended (on probable cause of unlawful presence in this country) from delaying determinations of deportability. Without the "no-unauthorized-work" release condition, the alien has a strong incentive to prolong deportation proceedings and delay a final determination while he continues to work.[10]

Given its limited resources, it makes sound administrative sense for INS to be able to impose a general condition on release that, in effect, commands aliens not to violate the law by working without authorization. The regulation simply shifts to an apprehended alien the burden of demonstrating that he

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[10] This Court has recently had occasion to comment that "[o]ne illegally present in the United States who wishes to remain already has a substantial incentive to prolong litigation in order to delay physical deportation as long as possible." *INS* v. *Rios-Pineda*, 471 U.S. 444, 450 (1985). The denial to INS of a mechanism to enforce the Act's prohibition on employment by those who are illegally in this country obviously enhances the incentive that such aliens have to delay their determination of deportability and subsequent voluntary departure or deportation.

has received authorization to engage in employment, or places on such an alien the responsibility to obtain employment authorization.[11]

It is significant that the regulation does not eliminate any rights that an alien may already have to engage in employment because the condition prohibits only *unauthorized* employment. Indeed, as part of the proposed amendment to the regulation, INS included a new, additional opportunity for an apprehended alien to apply to a district director for employment authorization. Furthermore, the condition on release is not a determination, or even a presumption, of deportability; rather it is a presumption that the alien has no authorization to work regardless of his or her status. If the alien is within a status entitled to work, or has obtained authorization from the district director, proof of that fact should be readily available,[12] and the condition will not apply. In cases where the alien applies to the

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[11] It also makes obvious sense to place on the alien the initial burden of seeking such authorization. Aliens who wish to enter the country with a status that permits employment bear the burden of initiating proceedings to obtain that status; and aliens who adhere to the law by seeking a change in status to permit them to work also bear the burden of initiating a change-in-status proceeding. There is no reason why aliens who are awaiting a deportability determination should not bear the same burden of initiating proceedings either to obtain work authorization or to demonstrate that they already have such authorization.

[12] For example, lawful permanent resident aliens are issued "green cards," which they are required to carry with them at all times as evidence of their status. See 8 U.S.C. 1304(e); 8 C.F.R. 211.1(b); *Saxbe* v. *Bustos*, 419 U.S. 65, 68 (1974). Nonimmigrants entitled to work in the United States can produce a visa, see 8 C.F.R. 212.1, which, by its class, will indicate the extent to which work is permitted (8 C.F.R. 109.1(a)(5) and (6)), a border crossing card (8 C.F.R. 212.1(c)), or a work authorization when required for a par-

district director for work authorization, or where the alien claims that he already has such authorization, or that he has filed a bona fide application for asylum, individualized determinations are made as to those claims.

The regulation is, therefore, fully consistent with the objectives of the INA and with decisions of this Court upholding other efforts to further those objectives. Used in tandem with enforcement techniques the Court has already sanctioned, and in tandem with the employer sanction provisions of the recently enacted Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3360, this regulation significantly enhances INS's enforcement efforts and furthers the goal of discouraging illegal immigration. The lower courts' invalidation, on a nationwide basis, of the no-unauthorized-work condition thus deprives INS of an important mechanism to enforce alien employment restrictions in the Act.

2. There is no proper basis for the holding that the invalidated regulation goes beyond the statutory authority granted to the Attorney General. The statutory langauge, legislative history, and longstanding administrative interpretation all contradict the ruling of the court of appeals that the only permissible purpose of bond conditions is to ensure appearance. Moreover, because an alien may demonstrate that he

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ticular nonimmigrant class (8 C.F.R. 109.1(b)). Refugees paroled into the United States receive appropriate documentation, and aliens granted asylum are issued a written decision (8 C.F.R. 208.8(b)). Moreover, each alien's evidence of registration has an "A" number, which can be given to INS to ascertain the alien's status. Thus, an alien who is permitted to work under the Act easily will be able to demonstrate that fact to INS officials responsible for releasing the alien on bond.

has work authorization or apply to the district director for such authorization, the courts below have not accurately characterized the regulation as precluding individual determinations.

a. The sole question in this case is one of statutory interpretation. Two statutory provisions are pertinent, and both authorize the condition at issue. The first, 8 U.S.C. 1252(a), is specifically concerned with the apprehension and detention of aliens pending deportation proceedings. The second, 8 U.S.C. 1103(a), generally empowers the Attorney General to administer and enforce the Act and other laws relating to immigration of aliens.

Section 242(a), 8 U.S.C. 1252(a), provides (emphasis added):

> Pending a determination on deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into cutody may, *in the discretion of the Attorney General* and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, *containing such conditions as the Attorney General may prescribe*; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability.

Reference to the broad powers contained in Section 103(a) of the Act, 8 U.S.C. 1103(a), reinforces the

wide discretion Congress intended to confer on the Attorney General to administer and enforce the Act (emphasis added):

> (a) The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens * * *. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such in[s]tructions; *and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter* * * *.

This Court repeatedly has stated that the starting point for interpreting a statute is "the language employed by Congress." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979). See also *Department of Transportation* v. *Paralyzed Veterans of America*, No. 85-289 (June 27, 1986), slip op. 6; *Northwest Airlines* v. *Transport Workers*, 451 U.S. 77, 91 (1981); *Steadman* v. *SEC*, 450 U.S. 91, 97 (1981). The courts "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984). "Absent a clearly expressed legislative intent to the contrary, [the statutory] language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). This principle applies to the INA, no less than to any other Act of Congress. See *INS* v. *Hector*, No. 86-21 (Nov. 17, 1986) (per curiam); *INS* v. *Phinpathya*, 464 U.S. 183 (1984).

The court of appeals made only a passing nod at the language of the statute before holding that it did not mean what it said. Despite acknowledging that the plain language of the Immigration and Nationality Act "appears to grant wide discretion to the

Attorney General" (App., *infra*, 7a) to impose conditions on the release bond of an alien, the court of appeals held that the no-unauthorized-work conditions at issue here is beyond that statutory authority. In the view of the court of appeals, the only conditions that the Attorney General may impose are those that are directly related to ensuring the alien's appearance at deportation proceedings.

There is no language in the statute that limits the Attorney General's discretion or indicates that the sole concern is with the alien's appearance at subsequent proceedings. Section 242(a) expressly gives the Attorney General discretion to retain the alien in custody, or to release him on bond, with or without conditions, and to revoke the bond. Since it is generally the purpose of a bond to ensure appearance, there would have been no point to the explicit authority to impose other conditions in addition to the mandatory appearance condition.

Congress certainly knows how to write a statute that limits the permissible purposes of bonds. For example, the provisions governing bond in criminal cases specifically enumerate both the permissible conditions of release and the purpose to be served by those conditions (18 U.S.C. (Supp. II) 3142(c), (g), and (h); see also 18 U.S.C. 3146 (repealed)).[13] In

[13] Notably, Congress has determined that the bond of a person who is charged with a crime *must* condition release on the person's not committing any crime while on release (18 U.S.C. (Supp. II) 3142(c)(1)). Although Congress has not made it *mandatory* that the bond of a person who is charged with an immigration violation condition release on the person's not committing further immigration violations, that is hardly a basis for concluding that the broad language of Section 242(a) *prohibits* the Attorney General from conditioning release on the person's not committing one specific immigration violation, namely engaging in unauthorized employment.

the very context of release on bond pending deportation proceedings, Congress once wrote a statute that unambiguously limited the allowable conditions to those designed to ensure appearance (8 U.S.C. (1940 ed.) 156), but that statute has been repealed in favor of the present provision. The broad language of Section 242(a) must mean that Congress intended the Attorney General to have wider authority to impose any conditions reasonably related to the broader purposes of the Act.

Under both Section 242(a) and Section 103(a) the Attorney General has wide discretion to impose a condition such as the no-unauthorized-employment rider on release bonds. Because that condition forbids only unauthorized employment, which is already prohibited by the Act, it fits well within the Attorney General's authority to enforce the immigration laws (as well as the laws in general).

b. Without explaining why it was necessary to look beyond the plain, unambiguous language of the statute, the court of appeals purported to justify its limitation on the Attorney General's discretion by referring to the legislative history of the bond provision. We submit, however, that the legislative history provides no basis for departing from the plain language of the statute and, indeed, strongly confirms that language.

As explained above, ch. 1024, § 23, 64 Stat. 1011, which became what is now 8 U.S.C. 1252(a), was originally proposed in H.R. 10, a bill that did not pass. The language of H.R. 10, however, was incorporated in Section 23, and there is no dispute that the relevant legislative history is contained in the reports accompanying H.R. 10; indeed, it is these reports on which the courts below relied. As indicated in the relevant passage (quoted at page 6, *supra*),

the reports signal a clear congressional intent to give the Attorney General "full discretion" and "untrammeled authority" to impose conditions *other than* a condition that the alien be produced for deportation proceedings. The condition requiring the alien to appear is not the only permissible condition but instead a mandatory condition that "shall be among the conditions of any such bond" (64 Stat. 1011).

It is difficult to imagine how Congress could have been any more explicit in stating its intent to grant the Attorney General power to decide on bond conditions, whether or not specifically contemplated by Congress and whether or not approved by the courts. Yet the courts below ignored the express affirmative language and looked instead to an illustrative list of conditions that might be imposed, including periodic reporting and furnishing information of the alien's whereabouts. They then read those examples as a limitation on the broad grant of discretion to impose conditions on release.

Although it is true that the examples contained in the legislative history relate to ensuring appearance, there is absolutely no basis for reading those examples as a limitation on the express language of the statute or the surrounding legislative history. Nothing in the report indicates that the examples were intended to be exclusive or limiting. Indeed, because Congress expressly mandated a condition ensuring appearance, it may have provided examples related to that compulsory condition and elected not to illustrate further what other kinds of conditions the Attorney General might "see fit to include." H.R. Rep. 1192, 81st Cong., 1st Sess. 6 (1949); S. Rep. 2239, 81st Cong., 2d Sess. 5 (1950). A mere list of examples of conditions cannot override the explicit language of the reports that "[t]he bill intends that the Attorney

General shall have full discretion in imposing any other conditions or terms in the bond or parole agreement which he may see fit to include" and "[t]he bill intends that the Attorney General shall have untrammeled authority to impose such conditions or terms as he sees fit in releasing an alien under bond or conditional parole pending final determination of the deportability of the alien" (*ibid.*).

c. The court of appeals failed to accord any deference to the opinion of the Attorney General that the INA permits a no-unauthorized-work condition on release bonds. In citing *In re Toscano-Rivas*, 14 I. & N. Dec. 550 (A.G. 1974), solely for the proposition that the Attorney General "has recognized the need for individualized determinations" (App., *infra*, 10a), the court of appeals totally ignored the significance of the Attorney General's opinion affirming his authority, under both 8 U.S.C. 1252(a) and 8 U.S.C. 1103(a), to impose a rider on release bonds prohibiting unauthorized employment (14 I. & N. Dec. at 556). The failure of the court of appeals even to acknowledge the longstanding position of the Attorney General that the statute authorizes such a condition does not accord the proper deference to the administrative official charged with implementing and enforcing the Act. See *INS* v. *Jong Ha Wang*, 450 U.S. 139, 144-145 (1981); *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. at 843-845; *United States* v. *Boyle*, 469 U.S. 241, 246 n.4 (1985); *Northeast Bancorp Inc.* v. *Board of Governors*, 472 U.S. 159, 168 (1985); *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9-10, 17; *Young* v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 5-6.

3. Despite holding that the statute does not authorize a "no-work" condition on bond because that

condition is unrelated to ensuring appearance, the court of appeals and the district court nevertheless acknowledged that in some cases a "no-unauthorized-work" condition on bond might be appropriate (App. *infra*, 10a, 25a). They rejected the 1983 regulations, however, as insufficiently related to the purposes of the Act and as an impermissible "blanket" condition. The internal inconsistency in the opinions of both lower courts appears to result from several errors, both factual and legal. To begin with, as explained above, the regulation does not "[do] away with individualized determinations" (App., *infra*, 28a). Instead, it presumes that an apprehended alien is not authorized to work and shifts to the alien the burden of seeking work authorization or demonstrating that he already has such authorization. Once the alien initiates this process, an individualized determination of the condition's applicability to that alien follows.[14]

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[14] Because the 1983 regulations contemplate individual determinations, it is not necessary to resolve the question whether the hypothetical regulation on which the court of appeals commented—one that does not involve individual determinations—would comport with the statute. Yet it is worthy of note that the courts below made no attempt to explain how the statute, which makes no mention of individualized determinations of bond conditions, can be read to support their holding. Because it is the Act that forbids aliens to engage in unauthorized employment, it would seem quite reasonable, and well within the broad language of Sections 242(a) and 103(a), to incorporate that prohibition into every release bond. So long as the condition is one that forbids only *unauthorized* work—and not, as the court of appeals erroneously stated, "a no-employment condition in every bond" (App., *infra*, 10a)—it is difficult to see what in the Act can be said to call for "individualized determinations."

The administrative precedent cited by the courts below shows only that the agency, *as a matter of policy*, once thought it appropriate to use no-unauthorized-employment

The court of appeals also erred in attempting to distinguish *Carlson* v. *Landon*, 342 U.S. 524 (1952), in which the Court rejected an argument similar to that made in this case. It was argued in *Carlson* that, under the Internal Security Act of 1950, the Attorney General could exercise his discretion to deny bail altogether only when necessary to ensure appearance at a deportation hearing. The Court, however, held that "the discretion as to bail in the Attorney General was certainly broad enough to justify his detention of all these parties without bail as a menace to the public interest" (342 U.S. at 541). The appropriate limitation on the Attorney General's exercise of discretion was simply that he "must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of communist activity" (342 U.S. at 543). If the Attorney General's discretion is wide enough to allow him to deny bail altogether "by reference to the legislative scheme," it follows a fortiori that the broad language of Section 242(a) and its legislative history permits the Attorney General to impose conditions that further the purposes of the immigration laws. The Attorney General so held in *In re Toscano-Rivas, supra.*[15]

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conditions more sparingly. See *In re Toscano-Rivas*, 14 I. & N. Dec. at 556-557 (Attorney General expressed concern that, if INS intended to use unauthorized employment conditions on release bonds, it do so by regulation in order to put aliens on notice that such conditions may be employed and to provide guidance for when such conditions may be appropriate); *In re Chew*, 18 I. & N. Dec. 262 (BIA 1982) (applying pre-1983 version of 8 C.F.R. 103.6); *In re Vea*, 18 I. & N. Dec. 171 (BIA 1981) (same). There is no suggestion in those cases that the policy that INS followed before 1983 was compelled by statute.

[15] "It would be unreasonable to construe the quoted language [from the legislative history] to mean that the Attor-

The court of appeals responded to these points (App., *infra*, 9a) by relying on an out-of-context remark in *De Canas* v. *Bica*, 424 U.S. 351, 360 (1976), and *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 892 (1984), that "[t]he INA evinces 'at best evidence of peripheral concern with employment of illegal entrants.'" The court chose to rely on that isolated statement rather than following, or even acknowledging, the more pertinent statement by this Court that "[a] primary purpose in restricting immigration is to preserve jobs for American workers" (*Sure-Tan, Inc.* v. *NLRB*, 467 U.S. at 893) or the statement by the Attorney General that "[i]t is generally agreed that a basic purpose of the immigration laws is to protect against displacement of workers in the United States" (*In re Toscano-Rivas*, 14 I. & N. Dec. at 555 (footnote omitted)).[16]

The holding of the court of appeals that this legislative purpose could not support imposition of the unauthorized-employment prohibition reflects its failure to examine the results the Court reached in *De Canas* and *Sure-Tan*, and in *Delgado*, as well as its superficial treatment of the legislative history and structure of the INA. As we have discussed above, a cen-

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ney General may impose bond conditions which are totally unrelated to the various purposes of the immigration laws, but the reports clearly demonstrate a Congressional intent to grant wide discretion otherwise." 14 I. & N. Dec. at 554 (footnote omitted).

[16] Given that basic legislative purpose, the Attorney General concluded that Section 103(a) "and the Attorney General's broad authority to enforce the immigration laws afford an independent basis [in addition to Section 242(a)] for requiring of persons subject to deportation proceedings bonds prohibiting unauthorized employment" (*In re Toscano-Rivas*, 14 I. & N. Dec. at 555).

tral focus of the Act's elaborate scheme governing admission of aliens to this country is the protection of the American workforce. The legislative history leaves no doubt that protection of legal resident workers was a primary purpose of the legislation and of various amendments.[17]

In *De Canas*, the Court held that the INA did not preempt a state law that prohibited knowing employment of unlawful aliens where such employment would adversely affect lawful permanent residents (424 U.S. at 359). Read in context, the Court's statement about the Act's "peripheral concern" with the employment of illegal entrants only means that the INA would not preclude the states from sharing in the regulation of employer-employee relationships.[18]

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[17] The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3360, should remove any doubt that Congress is seriously concerned with the impact of unauthorized alien labor on the American workforce. In *De Canas* the Court referred to the fact that Congress had never enacted employer sanctions for employment of illegal aliens as evidence of the Act's "peripheral concern" (424 U.S. at 360) with employment of illegal entrants. Now that Congress has enacted employer sanctions, any argument that the INA is not fundamentally concerned with employment of illegal aliens should be put to rest.

[18] The Court observed in *De Canas* that Congress had begun to attack the problem of illegal alien employment in the Farm Labor Contractor Registration Act, 7 U.S.C. 2041 *et seq.*, by authorizing "revocation of the certificate of registration of any farm labor contractor found to have employed 'an alien not lawfully admitted for permanent residence, or who has not been authorized by the Attorney General to accept employment.' " 424 U.S. at 361.

In any event, Section 274a(h)(2) of the Act, as added by Section 101 of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3360, expressly preempts "any State or local law imposing civil or criminal

Similarly, in *Sure-Tan*, the Court held that applying the protection of the NLRA to unauthorized alien employees would eliminate an economic incentive for employers to hire such unauthorized aliens to the detriment of legal resident workers. In turn, there would be less demand for illegal alien employees and thus less incentive for aliens to enter the country for the purpose of engaging in unauthorized employment. The Court's holding hardly evinces a peripheral concern with employment of illegal aliens.

The court of appeals has erred fundamentally in misconstruing the Act. That error has led it to the further error of invalidating a reasonable and important enforcement mechanism that is completely consistent with the language and the purposes of the INA as well as with the Attorney General's interpretation of his authority under the Act and with the decisions of this Court.

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sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." New Section 274a(h)(3), as also added by Section 101, defines "unauthorized alien" to mean an alien who is not authorized to be in the United States or who is not authorized to engage in employment. Thus, Congress has now expressed a clear intent to preempt local laws based on its strong concern with unauthorized alien employment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 85-6131

DC No. CV 83-7927-KN

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL., PLAINTIFFS-APPELLEES

vs.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California

Hon. David V. Kenyon, District Judge, Presiding

Argued and submitted April 9, 1986 at
Pasadena, California

[Filed June 13, 1986]

OPINION

Before: HUG and NORRIS, Circuit Judges, and SOLOMON,* District Judge.

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* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

SOLOMON, Judge:

The Immigration and Naturalization Service (INS) appeals the district court's grant of summary judgment in favor of National Center for Immigrants' Rights, Inc. (NCIR), appellees. The district court held that the inclusion of a condition barring unauthorized employment in every appearance and delivery bond issued in connection with a deportation proceeding exceeded the Attorney General's statutory authority under the Immigration and Nationality Act (I & N Act or Act). We affirm.

Facts

The I & N Act[1] is a comprehensive scheme intended to govern all aspects of the admission of aliens to the United States. The Act provides for the arrest and deportation of aliens present in the United States in violation of the law. 8 U.S.C. § 1357(a)(2) (1982). An alien taken into custody pending a final determination of deportability may, in the discretion of the Attorney General, "(1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole." 8 U.S.C. § 1252(a).

Under this statutory authority, the INS promulgated the following regulations:

> (ii) *Condition against unauthorized employment.* A condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding or bond

[1] 8 U.S.C. §§ 1101-1503.

posted for the release of an alien in exclusion proceedings, unless the District Director determines that employment is appropriate.

(iii) *Factors to be considered.* Only those aliens who upon application under § 109.1(b) of this chapter establish compelling reasons for granting employment authorization may be authorized to accept employment. Among the factors which may be considered when an application is made, are the following:

> (A) Safeguarding employment opportunities for United States citizens and lawful permanent resident aliens;
>
> (B) Prior immigration violations by the alien;
>
> (C) Whether there is a reasonable basis for considering discretionary relief; and
>
> (D) Whether a United States citizen or lawful permanent resident spouse or children are dependent upon the alien for support, or other equities exist.[2]
>
> * * *
>
> Any excludable or deportable alien who has posted an appearance and delivery bond may be granted temporary employment authorization if the District Director determines that employment is appropriate under § 103.6(a)(2)(iii) of this chapter.[3]

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[2] 8 C.F.R. § 103.6(a)(2)(ii) and (iii) (1985).

[3] 8 C.F.R. § 109.1(b)(8) (1985).

Appellees[4] filed this action to challenge the implementation of the regulation on both statutory and constitutional grounds. The district court granted a preliminary injunction enjoining the enforcement of the regulations. This court affirmed. *National Center for Immigrants Rights, Inc. v. Immigration and Naturalization Service*, 743 F.2d 1365 (9th Cir. 1984).

On remand, the district court granted appellees' request for class certification. The class consists of "all those persons who have been or may in the future be denied the right to work pursuant to 8 C.F.R. § 103.6." The district court held that the regulations are invalid because they were promulgated beyond statutory authority and because they impose a blanket condition on all arrested aliens. The district court granted summary judgment in favor of appellees.

In this appeal, the INS contends that the language of the Act gives the Attorney General complete discretion to impose any release condition which furthers the provisions of the Act. In addition, the INS contends that the district court lacked jurisdiction over individuals in the class because: 1) appellees did not file a habeas corpus proceeding as required

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[4] Appellees include thirteen nonprofit organizations providing free legal aid services to aliens with immigration problems, a local United Auto Workers affiliate, eleven named aliens held in detention, four named aliens released on bonds with conditions against unauthorized employment, and one unnamed alien who claims to be deterred from filing for benefits with the INS because of fears that the new regulations would result in that alien's indefinite detention.

by the Act; and 2) certain individuals failed to exhaust their administrative remedies.

Standard of Review

Appellate courts review *de novo* a trial court's grant of summary judgment. *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983). Summary judgment is appropriate when there are no genuine issues of material fact and when the evidence, viewed in a light most favorable to the opposing party, entitles the movant to prevail as a matter of law. *Id.* The court shall consider all admissible affidavits and supplemental documents on a motion for summary judgment. Fed. R. Civ. P. 56. Proper jurisdiction is a question of law and is also subject to *de novo* review. *See Clayton v. Republic Airlines, Inc.*, 716 F.2d 729, 730 (9th Cir. 1983).

Discussion

Jurisdiction of the District Court

In a class action, the court must have jurisdiction over the claims of the individual members of the class. *See Califano v. Yamasaki*, 442 U.S. 682, 701-702 (1979). The class certified must be limited to individuals who meet the requirements of the relevant jurisdictional statutes. *Id.*

Appellees assert that because the INS failed to raise its jurisdictional arguments at the trial level, the INS is precluded from raising them now. This assertion is without merit. A party may raise jurisdictional challenges at any time during the proceedings. *May Dept. Store* v. *Graphic Process Co.*, 637 F.2d 1211, 1216 (9th Cir. 1980).

The INS contends that the district court lacked jurisdiction because NCIR failed to file the habeas corpus action required under 8 U.S.C. § 1252.[5] We reject this contention because we have already determined that section 1252(a) is inapplicable to this case because the section deals only with complaints about delays in determining the deportability of individual aliens. *National Center, supra,* 743 F.2d at 1368.

The INS also contends that NCIR failed to exhaust the administrative remedies that the Act secures to detained aliens. The only exhaustion requirement of the Act[6] applies to "orders of deportation or of exclusion" and not to conditions imposed on bonds prior to such order. We hold that the district court had jurisdiction over the members of the certified class.

Review of Summary Judgment

Absent a clearly expressed legislative intent to the contrary, the language of a statute must ordinarily

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[5] 8 U.S.C. § 1252(a) provides in part that:

> Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

[6] 8 U.S.C. § 1105a(c) (1982) provides in part that:

> An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.

be regarded as conclusive. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

The INS asserts that the language of 8 U.S.C. § 1103 and § 1252(a) clearly grants authority to the Attorney General to impose any condition in a bond that he deems necessary to carry out the provisions of the Act. The Act contains a provision which conditions the entry of certain aliens into the United States on employment considerations. 8 U.S.C. § 1182 (a)(14). These limitations reflect Congress's desire to protect the American workforce from displacement due to immigration. The INS argues that the no-work condition is directly related to this purpose of the Act and is within the Attorney General's statutory authority.

The Attorney General may release an arrested alien pending a determination of deportability under a security bond "containing such conditions as the Attorney General may prescribe." 8 U.S.C. § 1252 (a). The express language of the statute appears to grant wide discretion to the Attorney General. Nevertheless, legislative history, prior legislation, and case law limit the allowable conditions to those that tend to insure the appearance of the alien in future proceedings.

Section 1252(a) deals solely with the arrest, custody and control of an alien pending determination of deportability. The specific examples of allowable conditions set out by Congress in the legislative history[7] relate solely to the ability of the Attorney

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[7] H.R. Rep. No. 1365, 82d Cong., 2d Sess. 6 (1952); H.R. Rep. No. 2980, 81st Cong., 2d Sess. (1950); H.R. Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949); S. Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950).

General and the INS to maintain contact with and control over aliens. These indicate a Congressional intent to limit the Attorney General's authority under section 1252(a) to the imposition of only those conditions which tend to insure an alien's appearance at future proceedings.

Relying on *Carlson v. Landon*, 342 U.S. 524 (1952), the INS asserts that the Attorney General's authority to impose bond conditions is not limited to these conditions. In our opinion, such reliance is misplaced. *Carlson* involved a challenge to the Attorney General's authority to hold five active Communists without bail pending the determination of their deportability. The Attorney General based his denial of bail primarily on the heightened Congressional interest in protecting the United States and its citizens from Communist activity, evidenced by the Internal Security Act of 1950,[8] and the Subversive Activities Control Act of 1950.[9] *Id.* at 529.

The Supreme Court examined the applicable deportation standards and found that the Attorney General did not have "untrammeled discretion" in determining bail. "[H]e must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity." *Id.* at 543.

The Court examined the specific legislative scheme of the Internal Security Act of 1950 and found that the statute granted the Attorney General authority broad enough to justify the detention of the Communist aliens. *Id.* at 541. Although the court noted that the general consideration for denial of bail was to insure availability for trial, it found that the

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[8] 8 U.S.C. §§ 137 and 155.

[9] 50 U.S.C. §§ 781-826.

Communist threat to the national security was exceptional. The Court held that the Attorney General was within the scope of his authority when he denied bail to the Communist aliens.

The scope of discretionary authority granted to the Attorney General under the Internal Security Act is much greater than the authority granted him under the Act. This court previously noted in *National Center, supra*, 743 F.2d at 1370:

> In contrast to Congress' clear directives under the Internal Security Act in the area of national security, "[t]he INA evinces 'at best evidence of peripheral concern with employment of illegal entrants.'" *Sure-Tan, Inc. v. NLRB*, —— U.S. ——, 104 S.Ct. 2803, 2809, 81 L.Ed.2d 732 (1984) (quoting *DeCanas v. Bica*, 424 U.S. 351, 360, 96 S.Ct. 933, 939, 47 L.Ed.2d 43 (1976)).

In *DeCanas v. Bica*, 424 U.S. 351 (1976), the Supreme Court held that a California statute that prohibited the knowing employment of illegal aliens if such employment would adversely affect lawfully resident workers was not preempted by the Act. *Id.* at 365. Likewise, in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), the Supreme Court held that the application of the National Labor Relations Act to undocumented aliens was not prevented by the Act because the Act was only peripherally concerned with the employment of aliens.

In *Carlson, supra*, there was evidence that each individual, at the time of his arrest, was a member of the Communist Party and had participated in the Party's indoctrination of others. *Carlson, supra*, 342 U.S. at 530. This evidence of individual personal activity justified the Attorney General's discretion to

deny bail. The *Carlson* court noted that not all deportable Communist aliens were automatically denied bail. This holding is in contrast with the regulations in this case which subject all arrested aliens to the no-work condition until the alien can prove "compelling reasons" for granting employment authorization.

The Attorney General, in his interpretation of his authority under the Act, has recognized the need for individualized determinations rather than the imposition of a blanket condition. *Matter of Toscano-Rivas, et al.*, 14 I & N Dec. 523 (1974). Earlier regulations and INS case law have required individualized determinations before the inclusion of a no-work condition in the bond. *See Matter of Chew*, I & N Dec. #2910 (July 1, 1982); and *Matter of Vea*, I & N Dec. # 2890 (November 4, 1981).

The statutes, legislative history, and pertinent case law indicate that the Attorney General's authority under 8 U.S.C. § 1252(a) of the Act is limited to the imposition of bond conditions which tend to insure the alien's appearance at future deportation proceedings. The peripheral concern of the Act with the employment of illegal aliens is not sufficient to support the imposition of a no-employment condition in every bond.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 83-7927-KN (JRx)

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL., PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS

[Filed Mar. 5, 1985]

ORDER

In 1983, the Immigration and Naturalization Service ("INS") promulgated Regulations[1] ("the Regulations") which place a condition barring employment in an appearance and delivery bond in connection with deportation proceedings. The no-work condition operates as follows: When a person is arrested as a suspected illegal alien and is later released on bond pending a deportation proceeding, the suspect is barred from becoming employed. However, the suspect may obtain employment authorization from the INS District Director upon application

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[1] 8 C.F.R. §§ 103.6(a)(2)(ii), (iii) (1983); 109.1(b)(8) (1983).

establishing "compelling reasons" for granting employment.

This action, brought by Plaintiffs [2] on December 6, 1983, challenged the implementation of the Regulations on both statutory and constitutional grounds. On December 16, 1983, this Court granted a preliminary injunction enjoining the enforcement of the Regulations. The Court of Appeals upheld the preliminary injunction on September 28, 1984.

The INS then brought this Motion for Summary Judgment, pursuant to Fed. R. Civ. P. 56(b), on the grounds that there is no genuine issue as to any material fact and that the INS is entitled to judgment as a matter of law. The Court finds that no genuine issue of material fact exists and that summary adjudication is appropriate. The Court further finds that the Regulations at issue are invalid because they were promulgated beyond statutory authority. Therefore, the Court grants Summary Judgment for the Plaintiffs, National Center for Immigrants' Rights, *et al.*, based upon its First Cause of Action.

This Court's grant of Summary Judgment for the Plaintiffs, as nonmoving parties, is consistent with prior case law. *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311-12 (9th Cir. 1982). Exen though Plaintiffs have made no formal cross-motion under Fed. R.

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[2] Plaintiffs include thirteen nonprofit organizations providing free legal aid services to aliens with immigration problems, a local United Auto Workers affiliate, eleven named aliens held in detention, four named aliens released on bonds with conditions against unauthorized employment and one unnamed alien who claims to be deterred from filing for benefits with the INS because of fears that the new regulations would result in that alien's indefinite detention.

Civ. P. 56, summary judgment is appropriate in this case because the INS has had an adequate opportunity to show that there is a genuine issue of fact and that their opponent is not entitled to judgment as a matter of law. Moreover, this is "in keeping with the objective of Rule 56 to expedite the disposition of cases and . . . with the mandate of Rule 54(c) requiring the court to grant relief to which a party is entitled 'even if the party has not demanded such relief in his pleadings.'" Wright & Miller, *Federal Practice and Procedure*, § 2720 (1983).

The Plaintiffs have asserted six Causes of Action in the instant case:

1. The Regulations at issue are invalid due to the fact that they were promulgated without statutory authority;
2. The INS Commissioner lacks statutory authority to promulgate the Regulations because they remove matters from the jurisdiction of immigration judges;
3. The Regulations violate the Fifth Amendment's Due Process Clause because it impinges on an important liberty interest without the opportunity for notice, hearing and due process proceeding of record;
4. The Regulations violate the Fifth Amendment's Equal Protection guarantee due to the adverse effect on indigent people;
5. The Regulations are inconsistent with and superseded by other federal legislation;
6. The INS has failed to establish uniform procedures to implement "work authorization"

policies and thereby violates Fifth Amendment guarantees of procedural and substantive due process.

The Court bases its ruling on the First Cause of Action and finds as a matter of law that the Regulations at issue were promulgated without statutory authority and are therefore invalid. Further, since the Court grants summary judgment on the Plaintiffs' First Cause of Action, consideration of the remaining five Causes of Action is unnecessary.

The Regulations state in relevant part:

§ 103.6 Surety bonds.

(a) . . . .

(2) *Bond riders*—(i) *General.* Bond riders shall be prepared on Form I-351 and attached to Form I-352. If a condition to be included in a bond is not on Form I-351, a rider containing the condition shall be executed.

(ii) *Condition against unauthorized employment.* A condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding or bond posted for the release of an alien in exclusion proceedings, unless the District Director determines that employment is appropriate.

§ 109.1 Classes of Aliens eligible.

. . . .

(b) . . . .

(8) Any excludable or deportable alien who has posted an appearance and delivery bond may be granted temporary employment authorization if the District Director determines that employ-

ment is appropriate under § 103.6(a)(2)(iii) of this chapter.[3]

. . . .

(Sec. 103 of the Immigration and Nationality Act, as amended (8 U.S.C. 1103))

8 C.F.R. §§ 103.6, 109.1 (1984).

The Court finds that two crucial issues are presented by this case. The first consists of whether the Attorney General can impose release conditions which are unrelated to securing the alien's presence at future deportation proceedings, yet which further the broad purposes of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* The second issue involves the discretion of the Attorney General to impose a blanket condition which inherently precludes any individualized determination.

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[3] § 103.6(a)(2)(iii) provides factors to be considered for a grant of employment authorization:

Factors to be considered. Only those aliens who upon application under § 109.1(b) of this chapter establish compelling reasons for granting employment authorization may be authorized to accept employment. Among the factors which may be considered when an application is made, are the following:

(A) Safeguarding employment opportunities for United States citizens and lawful permanent resident aliens;

(B) Prior immigration violations by the alien;

(C) Whether there is a reasonable basis for considering discretionary relief; and

(D) Whether a United States citizen or lawful permanent resident spouse or children are dependent upon the alien for support, or other equities exist.

I. *Can the Attorney General impose release conditions based on § 1252(a) which further a broad purpose of the Immigration and Nationality Act, but which are unrelated to securing the alien's presence at future deportation proceedings?*

The INS claims that the Attorney General's authority to condition an alien's release with a no-work provision pending deportation proceedings is well within his discretionary powers to carry out the broad purposes of the Immigration and Nationality Act ("INA"). Citing the protection of the U.S. domestic labor force as the broad purpose of the INA, the INS asserts that the no-work condition is reasonably related to this legitimate government interest. The INS bases its argument on the language, legislative history, and judicial and administrative interpretations of 8 U.S.C. 1252(a).

That section states:

> Pending a determination of deportability in the case of any alien . . ., such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, *containing such conditions as the Attorney General may prescribe*; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody and

> detained until final determination of his deportability.

8 U.S.C. § 1252(a) (emphasis added).

Although § 1252(a) appears on its face to grant a great deal of discretion to the Attorney General in his decision on whether to release an alien under bond, this discretion must be interpreted in light of a previous version of § 1252(a) as contained in § 242 of the Immigration and Nationality Act and its legislative history. This previous version read in part:

> . . . such alien may, in the discretion of the Attorney General, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. *It shall be among the conditions of any such bond, or of the terms of release on parole, that the alien shall be produced, or will produce himself when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody* . . . .

Pub. L. 831, 81st Cong., 1st Sess. § 23, reprinted in 1950 U.S. Code Serv. 1006 (emphasis added).

The accompanying legislative history of the previous version of § 1252(a) stated:

> These provisions, of course, enumerate only one of the conditions which is mandatory in the bond or as a parole condition. *This bill intends that the Attorney General shall have full discretion in imposing any other conditions or terms in the bond or parole agreement which he may see fit*

> *to include. Thus, a man released on bond might have as a condition of the bond that he also be subject to make periodic reports to the immigration officials as to his whereabouts and furnish other desired information.* Or a bond might provide as one of its conditions that upon demand by the Attorney General the existing bond shall be surrendered and a new bond in greater or less amount or other conditions shall be furnished. This bill intends that the Attorney General shall have untrammeled authority to impose such conditions or terms as he sees fit in releasing an alien under bond or conditional parole pending final determination of the deportability of the alien . . . .

H.R. Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949); S. Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950) (emphasis added). The applicability of this legislative history is underscored by H.R. Rep. No. 1365, 82d Cong., 2d Sess., 57, reprinted in 1952 U.S. Code Cong. & Ad. News 1653, 1711, which indicates that when Congress enacted § 1252(a) in its present form in 1952, that "this provision, in general, follows the procedure established by section 23 of the Subversive Activities Control Act of 1950." *Id.* Therefore, the scope of discretionary authority given to the Attorney General under the previous version also governs the scope of the discretionary authority provided here. Thus, the scope of discretionary authority of the Attorney General remains unchanged under § 1252(a).

The Court finds that the aforementioned statutory language, as shown by its legislative history, reveals that the Attorney General's discretion to condition release on bond pending deportation is properly limited

to conditions which are related to obtaining an alien's appearance at future proceedings. This finding is buttressed by the specific examples in the 1949 and 1950 legislative history of the previous version of § 1252(a), as well as a November 7, 1983 rulemaking proceeding for the Regulations at issue.

At the rulemaking proceeding, as reflected by 48 Fed. Reg. 51142 (November 7, 1983),

> Many commentators contended that the no-work condition is contrary to the purpose of the appearance bond, which is to assure the appearance of the alien at a deportation or exclusion hearing. Most commentators who focused on this issue asserted that assuring appearance was the *only* purpose of the bond.

The INS asserted after this proceeding that:

> While it is true that most bond conditions are aimed at ensuring appearance of an alien there does not appear to be any reason under Section 242 of the Act to limit conditions of release.

Id. The INS relied on the Attorney General's broad interpretation of his authority in this matter in *Matter of Toscano-Rivas*, 14 I. & N. Dec. 550, 555 (A.G. 1974), in support of this proposition. This Court does not find *Toscano* persuasive, especially in light of the ambivalent language which permeates that case. For instance, the Attorney General states that "the pertinent statutory provisions authorize, *in at least some* circumstances, the inclusion in appearance-and-delivery bonds of conditions which bar unauthorized employment." *Id.* at 553 (emphasis added). In addition, the Attorney General proclaims that "it *may* be proper to impose [such bond condi-

tions] upon aliens who become subject to deportation proceedings." *Id.* at 555 (emphasis added). Such language is a far cry from a persuasive, well-documented argument.

The INS' reliance on *Carlson v. Landon*, 342 U.S. 524, 72 S. Ct. 525, 96 L. Ed. 547 (1952), in asserting that the Attorney General may condition release on the basis of protecting the public interest (i.e. American Labor) is misplaced.

Carlson involved a challenge to the Attorney General's power to hold five active Communists without bail pending the determination of their deportability. The Supreme Court examined the applicable deportation standards and found that in carrying out the policies and standards as to what aliens are subject to deportation, "the Attorney General is not left with untrammeled discretion as to bail . . . . He must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity." 342 U.S. 524, 543.

The *Carlson* Court examined the specific legislative scheme of Title I, § 2 of the Internal Security Act of 1950 and found that the statute granted the Attorney General discretion broad enough to justify his detention of the Communists. *Id.* at 541. The statute provides in relevant part:

> The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to

> preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

Internal Security Act, Title I, § 2 (15) (1950). Based on its examination of the legislative scheme, the *Carlson* Court found that this provision was,

> designed to eliminate the subversive activities of resident aliens who seek to inculcate the doctrine of force and violence into the political philosophy of the American people. To this end provision was made for the detention and deportation of certain non-citizens, including members of the Communist Party.

342 U.S. 544. Although the Court addressed the issue of securing the aliens' presence at future deportation proceedings, it found that the Communist threat to the national security was controlling: ". . . [W]e also take into consideration the factor of probable availability for trial, which we do not think is of great significance in cases involving security from Communist activities of alien Communists . . . ." *Id.* at 541 n.35.

The broad scope of discretionary power granted to the Attorney General by § 2 of the Internal Security Act is distinguishable from his power to impose bond conditions under the INA. As the Court of Appeals noted in *National Center for Immigrants' Rights, et al. v. Immigration and Naturalization Service, et al.*, —— F.2d —— (9th Cir., 84-5504, Sept. 20, 1984) (slip opinion at 9):

> In contrast to Congress' clear directives under the Internal Security Act in the area of national security, "the INA evinces 'at best evidence of peripheral concern with the employment of illegal entrants.'" *Sure-Tan, Inc. v. NLRB*, 104 S. Ct. 2803, 2809 (1984) (quoting *De Canas v. Bica*, 424 U.S. 351, 361 (1976)).

Furthermore, Supreme Court cases have demonstrated that *Carlson* is not applicable to this case. *Sure-Tan, Inc. v. NLRB*, 104 S. Ct. 2803 (1984) and *De Canas v. Bica*, 424 U.S. 351, 96 S. Ct. 933, 47 L. Ed 43 (1976) cast doubt on the INS' assertion that the legislative scheme of the INA justifies the Attorney General's exercise of discretion to impose no-work conditions on release. The *De Canas* Court stated:

> The central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country. The comprehensiveness of the INA scheme for regulation of immigration and naturalization, without employment of illegal aliens as "plainly within . . . (that) central aim of federal regulation."

424 U.S. 351, 359 (emphasis added). *See also Sure-Tan, Inc.*, 104 S. Ct. 2803, 2809.

In light of *De Canas*, the INA cannot serve as the "legislative scheme" which authorizes the Attorney General, based upon the purpose of the protection of the domestic labor market, to impose no-work restrictions in appearance and delivery bonds. Therefore, this Court finds that the Attorney General's discretion to impose release conditions must be limited to

those conditions which are related to securing the alien's presence at future deportation proceedings.

II. *Can the Attorney General impose a blanket no-work condition on all illegal aliens who are released on bond pending deportation proceedings?*

The INS asserts that it is within the Attorney General's authority to impose an employment prohibition on *all* release bonds as per § 1252(a). Thus, they argue that a blanket condition should apply, rather than a condition based upon individualized determinations.

Carlson does not lend credence to such an argument, and can be further distinguished from the instant case. In *Carlson*, there was evidence as to *each* individual,

> indicating that he was at the time of arrest a member of the Communist Party of the United States . . . and had participated . . . in the Party's indoctrination of others to the prejudice of the public interest.

342 U.S. 530. This evidence of membership and personal activity in the Communist Party for each alien justified the exercise of the Attorney General's discretion to deny bail. *Id.* at 541.

Moreover, the *Carlson* Court found that not all deportable aliens were denied bail under the 1950 Internal Security Act. *Id.* at 541-42. This should be contrasted with the INS Regulations which subject all arrested aliens to the no-work condition on bail unless the alien can overcome the heavy burden of proving "compelling reasons" for granting employment authorization.

This Court agrees with Justice Frankfurter's dissent in *Carlson* which states that the Attorney General's discretion to impose a condition based on an individualized determination is different from his authority to do so by means of a blanket rule:

> If the Attorney General, after the Internal Security Act, had made a general ruling that thereafter he would not allow bail to any alien against whom deportation proceedings were started and who was then a member of the Communist Party—an undiscriminating, unindividualized class determination—it would disregard the clear direction of Congress for this Court not to hold that the Attorney General had exceeded the limits of his discretion.

Id. at 558. It should be noted that this aspect of Justice Frankfurter's dissenting opinion is in consonance with the majority decision in *Carlson*, which was based upon evidence as to *each* individual.

Several other judicial and administrative interpretations have upheld the principle that the "factors relevant to the exercise of discretion are factors that pertain to each individual as an individual." *Id.* at 562. *See Rubinstein v. Brownell*, 206 F.2d 449, 455-56 (D.C. Cir. 1953) (detention of alien seeking judicial review of deportation order was improper when Attorney General made no showing that the alien would abscond or engage in subversive or criminal activity), *aff'd per curiam by an equally divided court*, 346 U.S. 929 (1954); *O'Rourke v. Warden*, 539 F. Supp. 1131, 1137 (S.D.N.Y. 1982) (court should review Board of Immigration Appeals' decision to deny bail to determine whether it has a reasonable foundation in the record); *Matter of Patel*,

15 I. & N. Dec. 2491 (an alien should not be detained or required to post bond except on a finding that he is a threat to the national security, or that he is a poor bail risk).

In addition, under the prior regulation, the INS required individualized determinations in each case of the propriety of attaching a no-work condition to a bond. While the INS has the authority "in a *proper* case to impose a bond condition prohibiting unauthorized employment,"[4] it was not permittited in *Matter of Vea*, 15 I. & N. Dec. 2890 (BIA 1981). However, such a condition was upheld in *Matter of Chew*, 15 I. & N. Dec. 2910 (BIA 1982), based on a finding that it was "appropriate in this case." *Id.* at p. 265.

Therefore, this Court finds that the discretion of the Attorney General does not extend to the blanket imposition of a no-work condition on all aliens who are released on bond pending future deportation proceedings.

For the reasons discussed above, this Court finds that the Regulations have been promulgated beyond the statutory authority of the Attorney General and are therefore invalid. Accordingly, Summary Judgment is granted to the Plaintiffs.

Plaintiffs are asked to prepare proposed findings of fact and conclusions of law by March 15, 1985.

DATED: March 5, 1985

/s/ David V. Kenyon
DAVID V. KENYON
United States District Judge

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[9] *Matter of Vea*, 15 I. & N. Dec. 2890, p. 174.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-6131

D.C. No. CV 83-7927-KN

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL., PLAINTIFFS-APPELLEES

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS-APPELLEES [*sic*]

Appeal from the United States District Court
for the Central District of California

[Filed Sept. 23, 1986]

ORDER

Before: HUG and NORRIS, Circuit Judges, and SOLOMON,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hug and Norris have voted to reject the suggestion for rehearing en banc, and Judge Solomon recommends rejection of the suggestion.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-5504

D.C. No. CV 83-7927-KN

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL., PLAINTIFFS-APPELLEES

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding
Argued and Submitted June 8, 1984

[Filed Sept. 28, 1984]

OPINION

Before: WRIGHT, FERGUSON and REINHARDT, Circuit Judges

FERGUSON, Circuit Judge:

The Immigration and Naturalization Service (INS) appeals the district court's grant of a preliminary injunction restraining the INS from applying a new regulation which became effective December 7, 1983. The previous INS regulations provided that in his discretion the District Director, with the prior ap-

proval of the INS Regional Commissioner, could include a condition barring unauthorized employment in an appearance and delivery bond in connection with deportation proceedings. 8 C.F.R. § 103.6(a)(2)(ii) (1983). In the regulation now being challenged, the INS does away with individualized determinations. The new regulation provides in part that "[a] condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding. . . . Only those aliens who upon application . . . establish compelling reasons for granting employment authorization may be authorized to accept employment." 8 C.F.R. §§ 103.6(a)(2)(ii)-(iii), 109.1(b)(8) (1984).[1]

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[1] The new regulation states:

§ 103.6 Surety bonds.

(a) . . . .

(2) *Bond riders*—(i) *General.* Bond riders shall be prepared on Form I-351 and attached to Form I-352. If a condition to be included in a bond is not on Form I-351, a rider containing the condition shall be executed.

(ii) *Condition against unauthorized employment.* A condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding or bond posted for the release of an alien in exclusion proceedings, unless the District Director determines that employment is appropriate.

(iii) *Factors to be considered.* Only those aliens who upon application under § 109.1(b) of this chapter establish compelling reasons for granting employment authorization may be authorized to accept employment. Among the factors which may be considered when an application is made, are the following:

(A) Safeguarding employment opportunities for United States citizens and lawful permanent resident aliens;

On December 6, 1983, the plaintiffs brought suit to block implementation of the new regulation. The plaintiffs (referred to collectively as NCIR) include a number of nonprofit organizations which provide legal services to aliens with immigration problems and whose members and clients would be affected by the regulation, a United Auto Workers Union local affiliate, and 16 individuals currently in deportation proceedings. NCIR challenges the validity of the regulation under several different theories—that the regulation is without statutory authority, that it is not reasonably related to the purpose of assuring a detainee's appearance at future deportation proceedings, that it was promulgated unlawfully, that it violates fifth amendment due process and equal protection guarantees, and that it is inconsistent with and superseded by other federal laws.

On December 8, 1983, following a hearing, the district court denied a temporary restraining order and

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(B) Prior immigration violations by the alien;

(C) Whether there is a reasonable basis for considering discretionary relief; and

(D) Whether a United States citizen or lawful permanent resident spouse or children are dependent upon the alien for support, or other equities exist.

§ 109.1 Classes of aliens eligible.

. . . .

(b) . . . .

(8) Any excludable or deportable alien who has posted an appearance and delivery bond may be granted temporary employment authorization if the District Director determines that employment is appropriate under § 103.6 (a) (2) (iii) of this chapter.

. . . .

(Sec. 103 of the Immigration and Nationality Act, as amended (8 U.S.C. 1103))

Title 8, Code of Federal Regulations.

scheduled a hearing on NCIR's motion for a preliminary injunction. After hearing evidence and testimony on December 16, 1983, the court granted an injunction against enforcement of the regulation. Addressing only two of NCIR's theories, the court concluded that NCIR has a fair chance of showing that the regulation is invalid because it is inconsistent with the statute and because it violates due process guarantees. The district court further found that the harm to the plaintiffs from application of the regulation would be irreparable. It noted that individuals subjected to the no-work condition will be unable to support themselves and their dependents pending their deportation hearings and will have more difficulty obtaining bonds and counsel. The court found that this harm clearly outweighed the government's harm from delay in implementing the regulation.

DISCUSSION

Jurisdiction of the Dictrict Court

The INS raises a two-pronged threshold attack on the district court's jurisdiction. First, the INS asserts that judicial review is available only through the habeas corpus provisions of 8 U.S.C. § 1252(a). Second, the INS argues that this case is not ripe for adjudication.

The INS characterizes NCIR's challenge to the regulation as involving determinations concerning release on bond and thus as encompassed within the habeas corpus provision of section 1252(a), which states in part:

> Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention,

> release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

Precisely drawn statutory procedures, such as this habeas corpus procedure, are generally held to preempt more general grants of jurisdiction in cases to which they apply. *See, e.g., Brown v. GSA*, 425 U.S. 820, 834 (1976). The INS states that the legislative history shows Congress' intent to make section 1252 (a) an exclusive remedy:

> An alien arrested and taken into custody may, pending the final determination of deportability, be continued in custody, released on bond or released on conditional parole, and the determination of the Attorney General concerning such detention, release on bond or parole shall be subject to judicial review *only* upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with reasonable dispatch to determine deportability.

H.R. Rep. No. 1365, 82d Cong., 2d Sess. 57, *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1711-12 (emphasis added). Since this suit was not brought as a habeas corpus action pursuant to section 1252 (a), the INS argues that the district court lacked jurisdiction.

However, we conclude that section 1252(a) is inapplicable to this case. Section 1252(a) deals only with complaints about delays in determining deportability in individual cases. In *Haitian Refugee Cen-*

ter v. Smith, 676 F.2d 1023 (5th Cir. 1982), *disapproved on other grounds, Jean v. Nelson*, 727 F.2d 957, 976 n.27 (11th Cir. 1984) (en banc), the court drew a distinction between jurisdiction to rule on the merits of an individual deportation order and jurisdiction to rule on a pattern and practice of constitutional violations. The court held that although 8 U.S.C. § 1105(a) gave courts of appeals exclusive jurisdiction to review alleged procedural irregularities in an individual deportation hearing, an allegedly unlawful pattern, program, or scheme of immigration officials was subject to examination by the district court under federal question jurisdiction. *Id.* at 1033. Here, the NCIR challenges the imposition of an automatic employment prohibition in all release bonds on statutory and constitutional grounds. In its prayer for relief, NCIR does not seek a review on the merits of any individual determination by the INS regarding release on bond. *See id.* at 1033 n.23. Thus, the district court properly has jurisdiction under 28 U.S.C. § 1331 to examine the merits of NCIR's challenges and to enter declaratory and injunctive relief. The district court is also given jurisdiction over claims arising under the immigration statutes. 8 U.S.C. § 1329.

The INS also asserts that this challenge to the regulation is not ripe, arguing that because one of NCIR's major contentions is that the procedures used in applying the regulation are inadequate, the court should await a more concrete case which may throw more light on the statutory and practical justifications for the regulation. *See, e.g., Toilet Goods Association, Inc. v. Gardner*, 387 U.S. 158 (1967).

The relevant considerations in determining whether a challenge to administrative action is ripe are (1)

whether the issues are fit for judicial determination, and (2) the hardship to the parties from withholding consideration. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). The district court found that both considerations warranted present judicial review. The issues are "fit" for decision because the regulation is presently being enforced and is unquestionably final, because nothing in the Act precludes present review, and because the issues presented do not require further factual development by the administrative process. *See id.* More important, the district court found that the individual plaintiffs were suffering a significant and immediate hardship from the regulation. The court correctly concluded that the issue was ripe.

Standard of Review

We reverse an order issuing or denying a preliminary injunction only if the district court abused its discretion or based its decision in its preliminary review of the merits on erroneous legal principles. *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980).

To obtain a preliminary injunction, the moving party must demonstrate either (1) probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships sharply favors the moving party. *Beltran v. Myers*, 677 F.2d 1317, 1320 (9th Cir. 1982). These are not separate tests, but are the ends of a continuum; the greater the relative hardship to the moving party, the less probability of success must be shown. *Benda v. Grand Lodge of the International*

Association of Machinists, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979).

When, as here, the plaintiffs have shown that the balance of hardships sharply favors their side, the district court need only conclude that the plaintiffs have raised "serious questions" to justify the grant of a preliminary injunction. *Beltran*, 677 F.2d at 1320. The INS does not challenge the court's finding that the balance of hardships clearly favors the plaintiffs. The hardship from being unable to work to support themselves and their dependents, to obtain release bonds, and to pay for legal representation is beyond question.

The INS requests that this court decide the merits of the case because the validity of the regulation is a question of law reviewable de novo. We decline to do so. The only conclusion of law entered by the district court is that NCIR has a fair chance of prevailing on the merits on two of its arguments. The parties have not had the benefit either of a full opportunity to present their cases or of a final judicial decision on the merits of the controversy. *See University of Texas v. Camenisch*, 451 U.S. 390, 396 (1981). This court thus limits its review of the merits to determining whether the district court abused its discretion by concluding that NCIR had a fair chance of success. *See, e.g., Sports Form, Inc. v. UPI*, 686 F.2d 750, 752 (9th Cir. 1992). *See also Otero Savings & Loan Association v. Federal Reserve Bank of Kansas City*, 665 F.2d 275, 277 (10th Cir. 1981) (review on merits is limited to extraordinary cases in which trial court has ruled on a motion for preliminary injunction based on a final interpretation of the law as applied to undisputed facts).

Is the Regulation in Accordance with the Immigration and Nationality Act?

The district court found merit in NCIR's argument that a condition of release must be related to securing the detainee's presence at future deportation proceedings. *See, e.g., Matter of Patel,* 15 I&N Dec. 666 (BIA 1976). Section 242 of the Immigration and Nationality Act, 8 U.S.C. § 1252(a), authorizes the Attorney General to set conditions for release on bond:

> Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. . . .

The INS asserts that this Act gives the Attorney General "untrammeled" authority to impose any release conditions reasonably related to the purposes of the Act, and that a major purpose of the Act is to protect the American labor force by precluding aliens from engaging in unauthorized employment. The INS relies on 8 U.S.C. §§ 1101(a)(15), 1182(a)(14) for this proposition. Thus, the INS argues, prohibiting employment pending deportation hearing is consistent with the overall legislative scheme.

To support this argument, the INS relies primarily on *Carlson v. Landon,* 342 U.S. 524 (1952). *Carlson*

involved a challenge to the Attorney General's decision to hold five active alien Communists without bail pending determination of their deportability. *Carlson* does not conclusively control this case for two reasons. First, in *Carlson*, the Attorney General justified the exercise of his discretion to deny bail "by reference to the legislative scheme to eradicate the evils of Communist activity." *Carlson*, 342 U.S. at 543. The Supreme Court stated that "[a]s the purpose of the Internal Security Act to deport all alien Communists as a menace to the security of the United States is established by the Internal Security Act itself, Title I, § 2, we conclude that the discretion as to bail in the Attorney General was certainly broad enough to justify his detention of all these parties without bail as a menace to the public interest." *Carlson*, 342 U.S. at 541. In contrast to Congress' clear directives under the Internal Security Act in the area of national security, "[t]he INA evinces 'at best evidence of peripheral concern with employment of illegal entrants.'" *Sure-Tan, Inc. v. NLRB*, 104 S. Ct. 2803, 2809 (1984) (quoting *De Canas v. Bica*, 424 U.S. 351, 360 (1976)). Congress has not made it a criminal offense for an alien to accept employment after entering this country without proper authorization. *Sure-Tan*, 104 S. Ct. at 2809.

Second, in *Carlson*, there was evidence as to each of the aliens of "membership plus personal activity in supporting and extending the Party's philosophy concerning violence" which justified the exercise of the Attorney General's discretion to deny bail. *Carlson*, 342 U.S. at 541. The Court noted that not all persons arrested as deportable under the Internal Security Act are denied bail. *Id.* at 541-42. The discretion of the Attorney General to impose a condi-

tion on a particularized showing in an individual case is quite different from the authority to do so by a blanket rule. As Justice Frankfurter observed:

> If the Attorney General, after the Internal Security Act, had made a general ruling that thereafter he would not allow bail to any alien against whom deportation proceedings were started and who was then a member of the Communist Party—an undiscriminating, unindividualized class determination—it would disregard the clear directive of Congress for this Court not to hold that the Attorney General had exceeded the limits of discretion.

Id. at 558 (Frankfurter, J., dissenting). *Cf. Rubinstein v. Brownell*, 206 F.2d 449, 455-56 (D.C. Cir. 1953) (detention of alien seeking judicial review of deportation order was improper when Attorney General made no showing that the alien would abscond or engage in subversive or criminal activity), *aff'd per curiam by an equally divided court*, 346 U.S. 929 (1954). *See also O'Rourke v. Warden*, 539 F. Supp. 1131, 1137 (S.D.N.Y. 1982) (court should review whether agency's decision to deny bail is supported by or has reasonable foundation in the record). In conformity with these authorities, under the prior regulation the INS required specific, individualized information to justify an employment prohibition condition in each case. *Matter of Vea*, Interim Decision #2890 at 5 (BIA 1981); *Matter of Leon-Perez*, 15 I&N Dec. 239 (BIA 1975); 8 C.F.R. § 103.6(a)(2) (1983).

In addition to arguing that the Attorney General's discretion does not extend to imposing a blanket condition such as this one, NCIR argues that the non-

employment condition is not rationally related to the statutory purpose of protecting domestic labor. At the preliminary injunction hearing, NCIR introduced expert testimony and evidence tending to show that employment by aliens awaiting deportation proceedings does not affect American unemployment. The district court has not yet made any findings or conclusions based on that evidence.

We decline to discuss the other arguments advanced by the INS because we agree with the district court that NCIR has a fair chance of prevailing on the merits of its argument that the regulation is invalid because it [*sic*] not related to the purposes of the Act and does not require individualized determinations.[2] Under the law of this circuit, NCIR was thus entitled to a preliminary injunction. *Los Angeles Memorial Coliseum Commission*, 634 F.2d at 1200.

Necessity for Class Certification

NCIR framed its complaint as a class action suit, but did not move for class certification prior to the preliminary injunction. The district court enjoined the INS from applying the regulation without making any findings as to class membership.

The INS asserts that in the absence of class certification, the preliminary injunction may properly

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[2] The NCIR also contends that detained aliens have a protected liberty interest under the fifth amendment in working until their deportability is determined in a due process hearing. In addition, plaintiffs argue that the regulation violates their due process rights under the fifth amendment because it lacks procedures by which an alien may obtain employment authorization. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). Although we need not decide these questions here, we agree with the district court that plaintiffs' arguments have some merit.

cover only the named plaintiffs. We agree. *See, e.g., Hollon v. Mathis Independent School District*, 491 F.2d 92 (5th Cir. 1974) (when suit was brought by individual challenging school regulations, a preliminary injunction enjoining enforcement of the regulation against anyone else went further than necessary to serve the purpose of maintaining the parties' status quo pending trial on the merits); *Davis v. Romney*, 490 F.2d 1360, 1366 (3d Cir. 1974) ("Relief cannot be granted to a class before an order has been entered determining that class treatment is proper"); *Tape Head Co. v. RCA*, 452 F.2d 816, 819 (10th Cir. 1971).

We therefore remand for possible modification of the injunction because on the basis of the present record its scope is too broad. On remand, if the district court fails to certify a class of plaintiffs, it must limit the injunction to apply to the named plaintiffs only.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. Cv. 83-7927 Kn (JRx)

NATIONAL CENTER FOR IMMIGRANTS RIGHTS, INC., ET AL., PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS

[Filed Dec. 16, 1983]

ORDER RE: PRELIMINARY INJUNCTION

The Court, having heard argument from counsel on December 16, 1983, with respect to plaintiffs' Motion for Preliminary Injunction, and having considered the points and authorities and declarations filed therewith,

IT IS HEREBY ORDERED that plaintiffs' motion is granted.

Initially, the Court must determine the jurisdictional issues of ripeness and standing. Also, prior to reaching a decision on the merits of the preliminary injunction, the Court must decide whether, in its

discretion, plaintiffs should be required to exhaust their administrative remedies before coming to this Court for a judicial determination.

I. *RIPENESS*

In determining whether an issue is ripe for judicial decision the Supreme Court has articulated two relevant considerations: (1) whether the issues are fit for judicial decision and (2) what will be the hardship to the parties if this Court were to withhold its consideration. *Abbott Laboratories* v. *Gardener*, 387 U.S. 136, 149 (1976); *Pacific Gas and Electric* v. *State Energy Res. Conservation*, —— U.S. —— 103 S.Ct. 1713, 1720 (1983). This Court finds that both of these considerations warrant the assertion of jurisdiction at the present time.

Four attributes of the issues in this litigation necessitate the conclusion that these issues are as fit for judicial decision as were the issues in *Abbott Laboratories*. First, in *Abbott* the regulation had not yet been enforced, although the Court still found the agency action to be "final" for purposes of review under the Administrative Procedure Act. In this action, because the regulation is presently being enforced, no question exists as to its finality. Second, similar to the Food, Drug, and Cosmetic Act underlying the *Abbott Laboratories* action, this Court does not find that the Immigration and Nationality Act precludes review of this no-work bond condition at this time. The exhaustion of administrative remedies requirement provided for in § 106(c) only applies to "an order of deportation or of exclusion", not to the conditions of a bond that would be imposed prior to such an order. 8 U.S.C. § 1105a(c). Third, issues presented in this action do not require

further factual development by the administrative process and will be dispositive of plaintiffs' claim.

As to the second *Abbott* consideration, it is clear that the impact on the plaintiffs or their members is "significant and immediate". *Kerr-McGee Chemical Corp.* v. *U.S. Dept. of the Interior*, 709 F.2d 597, 600 (9th Cir. 1983). At a minimum, individuals subjected to the no-work condition will be unable to work and support themselves until the District Director or Immigration Judge determines that they may do so. Further, the potential impact on these individuals also includes more difficulty in obtaining bonds and counsel as well as significantly affecting those dependent upon the alleged illegal alien. Beginning on December 7, 1983, these hardships were being felt. Certainly this hardship to the parties if judicial consideration was withheld at the present time, coupled with the fitness of the issues for judicial decision, compels the Court to conclude that the case is ripe for judicial determination.

II. *STANDING*

Each association has standing to bring this action on behalf of its members if:

(a) its members would otherwise have standing to sue in their own rights;

(b) the interests it seeks to protect are germane to the organization's purpose; and

(c) neither the claim nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. *Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977). The plaintiff associa-

tions have demonstrated that each of these elements is present. First, they have established that their "members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975). Members of the plaintiff organizations have been, are continuing to be, and will in the future be subject to this no-work bond condition. Even though this bond condition may be removed on a case-by-case basis, until it is removed, the individual is suffering immediate injury. Second, there has been no argument presented by the defendant that the interests these organizations are seeking to protect are not germane to the organizations' purposes. To the contrary, it appears to this Court that such interests are germane to these purposes. Third, plaintiffs are only seeking injunctive and declaratory relief. Where plaintiffs are only seeking such prospective relief, "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Warth* v. *Seldin*, 422 U.S. at 515. Hence, this Court does not need the participation of individual members to provide the relief requested.

As to the individual plaintiffs, the Court finds that they are also confronted with immediate or threatened injury and therefore have standing to bring this action. They have either been subject to this no-work condition as a part of their release on bond or they are threatened with the immediate injury already described.

III. *EXHAUSTION OF ADMINISTRATIVE REMEDIES*

As noted above, there is no statutory provision requiring plaintiffs to exhaust administrative remedies before seeking judicial determination. Therefore, whether plaintiffs should be required to exhaust administrative remedies is left to the sound discretion of this Court. *Kale* v. *United States*, 489 F.2d 449, 454 (9th Cir. 1973). In exercising this discretion, the Ninth Circuit has instructed the Court to balance "the interests of the agency in applying its expertise, correcting its own errors, making a proper record, enjoying appropriate independence of decision and maintaining an administrative process free from deliberate flouting, and the interests of private parties in finding adequate redress for their grievances." *Montgomery* v. *Rumsfeld*, 572 F.2d 250, 253 (9th Cir. 1978).

In the context of the pending action, this balance clearly favors the plaintiffs. It is clear that the administrative decisionmakers will not be able to decide the constitutional questions raised by plaintiffs. More importantly, the determinative statutory and constitutional issues that comprise this action neither depend upon the expertise of the agency nor require the making of a further administrative record. Perhaps of paramount importance, the very harm that this Court seeks to prevent is the continuation of administrative proceedings while the private party to the proceedings is not allowed to work. In this situation, the immediate redress for the plaintiffs plainly outweighs any agency interest that could be asserted.

IV. *PRELIMINARY INJUNCTION*

The grant or denial of a preliminary injunction rests in the discretion of the trial court. *Deckert* v.

Independence Shares Corp., 311 U.S. 282 (1940); *County of Santa Barbara* v. *Hickel*, 426 F.2d 164 (9th Cir. 1970). Since a preliminary injunction is an extraordinary remedy, it should not be granted unless the moving party, by a clear showing, carries the burden of persuasion. *Sierra Club* v. *Hickel*, 433 F.2d 24 (9th Cir. 1970), *aff'd.*, 405 U.S. 727 (1972).

There are two tests in the Ninth Circuit which are used to determine whether a preliminary injunction should issue. The first test requires the court to look at the following factors:

(1) whether the moving party will suffer irreparable injury if injunctive relief is not granted;

(2) the probability of success on the merits;

(3) whether, in balancing the equities, the non-moving party is harmed more by the injunction than the moving party is helped; and

(4) whether granting the injunction is in the public interest.

Sierra Club v. *Hickel*, *supra*, at 33.

The second test, developed in the Second Circuit and adopted in the Ninth Circuit as an alternative test, requires the moving party to meet the burden of demonstrating *either*:

(1) a combination of probable success and the possibility of irreparable injury, *or*

(2) that serious questions are raised and the balance of hardships tips sharply in the moving party's favor.

Charlie's Girls, Inc. v. *Revlon, Inc.*, 483 F.2d 953 (2d Cir. 1973); *William Inglis & Sons Baking Co.* v.

ITT Continental Baking Co., 526 F.2d 86 (9th Cir. 1975).

Under the alternative test, it is not necessary that the moving party be reasonably certain to succeed on the merits. If the harm that may occur to the moving party is sufficiently serious, it is only necessary that there be a fair chance of success on the merits. *Semmes Motors, Inc.* v. *Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970); *Costandi* v. *AAMCO Automatic Transmissions, Inc.*, 456 F.2d 941 (9th Cir. 1972).

In considering the showing which plaintiffs must make in order for this Court to grant a preliminary injunction, the Court focuses on two of plaintiffs' arguments: (1) whether the no-work condition of the bond must be relevant to the purpose of securing the appearance of the alien at the deportation hearing and (2) whether the contested regulations deprive aliens of their due process rights under the Fifth Amendment because they are automatically denied the right to work.

The Court believes that plaintiffs have a fair chance of succeeding on their argument that the no-work condition is not in accordance with statutory intent and constitutional requirements. The Court finds merit in the argument that any conditions imposed on the bond must be relevant to the purpose of securing the appearance of the alien at his deportation proceeding. *Matter of Patel*, Interim Decision No. 2491 (1976).

As to the second argument, the due process claim, the Court finds that plaintiffs have a fair chance of success on the merits. In order to show a deprivation of due process, plaintiffs must show that (1) they had a "liberty" or "property" interest and (2) that it was deprived without due process of law.

It is undisputed that the right to work is a "liberty interest." *Greene* v. *McElroy*, 360 U.S. 474, 492 (1952). Defendants contend that detained individuals do not have this right to work because of their status as illegal aliens. However, this argument assumes the very fact which the government has the burden of proving and has not yet done so. *Woodby* v. *INS*, 385 U.S. 276, 286 (1966). The Court believes that plaintiffs have a fair chance of showing at trial that the detained individuals are entitled to this right until the government proves their illegal status.

Under the contested regulations, plaintiffs are automatically denied this right to work as a condition of posting bond. The individual may obtain work authorization upon a showing of "compelling reasons" to the District Director, 8 C.F.R. § 103.6(a)(2)(iii), or through a bond reduction hearing before the Immigration Judge. In determining whether the regulations comport with due process, the Supreme Court in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), sets forth the following three factors to consider: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest.

The private interest at stake is the prohibition against employment pending deportation or a decision by the District Director or an Immigration Judge allowing the individual to work. In terms of the risk of erroneous deprivation, the Court observes that *all* aliens who post bond are automatically subjected to the no-work condition. Evidence presented

indicates that the delay between the earliest time the detainee could be released and a review of the bond condition by the Immigration Judge varies from a few hours to several weeks, largely depending upon the location of the hearing. While the evidence shows that a review by a District Director is generally obtainable on much shorter notice, the evidence at this point clearly indicates that this review is not designed to comport with due process requirements. Also, plaintiffs have raised serious questions as to the procedural sufficiency of the bond reduction hearings before the Immigration Judge. Based on these findings, the Court believes that a significant risk of erroneous deprivation prior to a due process hearing may exist. Finally, the government asserts that the interest at stake is the protection of the American labor force. While this Court need not determine at this time whether the government interest outweighs the private interest, or vice versa, the Court concludes that plaintiffs have at least a fair chance of proving at trial that the *Mathews* v. *Eldridge* factors weigh in their favor.

With respect to the injury element of the preliminary injunction standards, there is sufficient evidence of the possibility that the regulations will impose irreparable harm to those who fall within the purview of the no-work condition. The Court has made note of some of the kinds of harm that will arise from the contested regulations in its analysis of the ripeness issue above. Balancing this harm with the harm to the government, the Court recognizes the vital importance of protecting the American labor force. However, the Court notes that this problem has existed for several decades. In terms of the time between the issuance of this preliminary injunction

and the trial, the Court believes that the immediate hardship to the plaintiffs clearly outweighs the hardships to the government caused by a reasonable delay in the implementation of these regulations: The Court therefore finds that plaintiffs have satisfied the requirements for the issuance of a preliminary injunction under the tests employed in this Circuit.

WHEREFORE, IT IS ADJUDGED AND DECREED that defendants, their employees, agents and successors in office are preliminarily enjoined from enforcing 8 C.F.R. § 103.6(a)(2) (ii) and (iii) (1983) and 109.1(b)(8) (1983), which became effective December 7, 1983 (Federal Register, Vol. 48, No. 216, Pages 51142-44 (November 7, 1983)) or informing detainees that such regulations are in effect. Any such conditions already imposed pursuant to the new regulations shall be stricken.

Plaintiffs' attorney is ordered to prepare Findings of Fact and Conclusions of Law and submit them to this Court not later than January 3, 1984.

DATED: This 16th day of December, 1983.

/s/ David V. Kenyon
DAVID V. KENYON
United States District Judge

APPENDIX F

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 103 and 109

Powers and Duties of Service Officers; Availability of Service Records; Employment Authorization; Excludable Deportable Aliens

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This final rule revises the regulations relating to the imposition of bond conditions against employment in the case of aliens who are placed in exclusion or deportation proceedings. Work authorization may be granted in certain instances, upon application by the alien. The decision to authorize employment will lie with the district director of the Service. The revisions will eliminate the present cumbersome procedures by which Regional Commissioners are authorized to impose bond conditions against employment.

EFFECTIVE DATE: December 7, 1983.

FOR FURTHER INFORMATION CONTACT: For General Information: Loretta J. Shogren, Director, Policy Directives and Instructions, Immigration and Naturalization Service, 425 Eye Street NW., Washington, D.C. 20536, Telephone: (202) 633-3048.

For Specific Information: Robert J. Schmidt, Detention and Deportation Officer, Immigration and Naturalization Service, 425 Eye Street NW., Washington, D.C. 20536, Telephone: (202) 633-4120.

SUPPLEMENTARY INFORMATION: On March 2, 1983, a proposed rule was published in the Federal Register (48 FR 8820) to revise the regulations relating to work authorization of aliens apprehended or detained for immigration law violations. The proposed rule provided for revision of both 8 CFR Parts 103 and 109. The regulations up until the present have allowed an alien in deportation proceedings to work, unless a Regional Commissioner of the Service, upon recommendation by a district director, imposed a specific condition of release barring employment.

Under the final rule, only the district director will decide whther or not an alien in proceedings will be granted work authorization. In order to qualify for this privilege, the alien will have to apply for work authorization and establish that employment should be authorized at the discretion of the district director. The final rule contains factors which may be taken into account by the district director in considering employment authorization. The burden will be on the alien to establish that the authorization should be granted. Among the factors which may be considered are the presence of U.S. citizen or permanent resident relatives who were dependent on the alien for support, and the likelihood that the alien will qualify for some type of relief from deportation or exclusion.

Following publication of the proposed rule, a large number of comments were received. Critical comments may be roughly divided into five categories:

(1) That the rule went beyond the Service's statutory authority;

(2) That the rule would result in fewer bonds being written and more persons being detained;

(3) That the rule would impose significant hardships on citizens and permanent resident relatives and asylum seekers;

(4) That the proposed rule did not meet rule making standards as to determinations of economic impact under the Regulatory Flexibility Act or Executive Order 12291; and

(5) That the standards to be applied in granting employment authorization were unclear.

Of the criticisms, the first three represent a misinterpretation of the immigration law and the regulation itself.

These comments will be considered in sequence:

1. The comment that the rule went beyond the Service's statutory authority

Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252, authorizes the Attorney General to set conditions for release on bond. The standards applied must be reasonable. *Matter of Toscano-Rivas*, 14 I&N Dec. 523 (BIA 1972); (A.G. 1974). A reasonable condition is one that prohibits an alien under deportation or exclusion proceedings from working without authorization. Such unauthorized work is a continuing violation of the immigration laws. Unauthorized work is in direct contravention of one of the "dominant purpose(s) of the immigration laws" which is "to protect American workers," as one commenter conceded, although further characterizing this determination as a "legislative determination."

Many commenters contended that the no-work condition is contrary to the purpose of the appearance bond, which is to assure the appearance of the alien at a deportation or exclusion hearing. Most comment-

ers who focused on this issue asserted that assuring appearance was the *only* purpose of the bond. The Attorney General in 1974 found otherwise:

> It is generally agreed that a basic purpose of the immigration laws is to protect against the displacement of workers in the United States. Thus, under an approach similar to that used in *Earle,* [*Earle v. United States,* 254 F2d 384 (2 Cir. 1958); cert. denied, 358 U.S. 822(1958)) it may be that section 103(a) and the Attorney General's broad authority to enforce the immigration laws afford an independent basis for requiring of persons subject to deportation proceedings bonds prohibiting unauthorized employment. Such bonds are frequently required of nonimmigrant aliens seeking either admission to the United States, or an extension of their stay. It may be proper to impose a similar requirement upon aliens who become subject to deportation proceedings. The result would be a bond serving two related but independent purposes. *Matter of Toscano-Rivas,* at 555.

It is clear from this that a bond condition barring unauthorized employment may have dual purposes. While it is true that most bond conditions are aimed at ensuring appearance of an alien, there does not appear to be any reason under Section 242 of the Act to limit conditions of release. For example, where a nonimmigrant visitor is apprehended for violating the conditions of his stay by working, it is entirely appropriate to impose, as a condition of release, a condition barring further unauthorized employment. If this is not done, upon release, the alien could simply continue his employment with impunity until

a deportation hearing was scheduled and through the appeal process. There is no provision in the immigration law which mandates such a result.

A condition barring employment could, therefore, be used in tandem with a money bond whose purpose would be to insure the alien's appearance. The violation of a condition barring employment would not necessarily lead to a breach of the money bond, because the alien might appear even if he or she were violating the condition against unauthorized employment. Where the "no work" condition is violated, the appropriate response would be to take the alien into custody.

The argument that the Service would be using a *bond* for improper purposes, i.e., "no work," misses the point. It is not the bond which imposes "no work." Rather, "no work" is a condition of release, which, if violated, gives the Service the right to order the alien to surrender and appear. If the alien fails to appear following a breach of the condition of release, the Service may declare the bond to be in default, just as if the alien failed to appear at a scheduled court date. The bond requires the bonding company to pay (or the alien to forfeit a cash bond) upon the alien's unexcused failure to appear, either upon a date certain or upon an order to surrender following a breach of a condition of release. The Service is imposing "no work" as a condition of release, unless, of course, the alien applied to and received, from the district director, permission to work.

Most importantly, the regulation does not necessarily change the number of aliens ultimately allowed to work. In each case, if an alien desires to work, the response to the inquiry could be the same. There is just a different starting point. The person seeking to work will have the burden of going forth with the

application to the district director, who is the party best able to consider that application.

Under this formulation, the comments made by many commenters to the effect that bonds could not be written if the alien did not work, were based, in part, on a false premise. The premise was that violation of the "no work" condition would necessarily lead to bond breach.

2. The comment that the rule would result in fewer bonds being written and more aliens being detained

In considering whether to publish the proposed rule, Service officials were aware that bonding companies and other sureties might be affected by the rule. It was understood that in certain instances a bond might not be quite as attractive if a "no work" release condition were imposed. The possibility that a bonding company might require more collateral or charge higher premiums was also considered. As a corollary of these possibilities, it was also assumed that more aliens might have to be detained. This latter possibility was considered an acceptable consequence. In balance, it was decided that prevention of employment by illegal aliens and safeguarding of employment of U.S. citizens and permanent resident aliens were more important considerations than inconvenience to bonding companies or increased detention costs.

3. The comment that the rule would impose significant hardships on citizens and permanent resident aliens and asylum seekers

These comments failed to take into account the fact that the proposed rule specifically provided protections for persons in these categories. In the first

instance, permanent resident aliens are not affected by these release conditions. Until such time as permanent resident status is lost, the permanent resident alien has the right to work in the United States, if released on bond. The Service, therefore, has no intention of applying this condition to a permanent resident alien in exclusion or deportation proceedings.

The regulation also allows a district director to take permanent resident and U.S. citizen relatives into account when considering an application for employment authorization. If the alien in proceedings supports such relatives, employment may be authorized.

Aliens who have applied for asylum will not be affected by these regulations. Employment is governed by 8 CFR Part 208. Those provisions allow a district director to authorize employment for an asylum applicant who has filed a non-frivolous asylum application.

4. The criticism that the proposed rule did not meet rule making standards relating to economic impact determinations under the Regulatory Flexibility Act or Executive Order 12291

A. *Executive Order 12291.* A large number of commenters stated that the proposed rule was a "major rule" under Executive Order 12291 because of its effect on bonding agencies, aliens and their families, the Service, and State and local governments. The gist of the criticisms was that a no-work condition would result in no bonds being written because bonding companies would not bond unemployed aliens. As a consequence, aliens would have to be detained, or the alien would be released and have to be supported at public expense, along with the alien's family.

Under the Executive Order, a "Regulatory Impact Analysis and Review" is required for every "major rule." This includes a rule which is likely to result in "A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions." If the rule is "likely" to result in these consequences, then a detailed analysis must be undertaken, following the prescribed format, and transmitted to OMB.

The discussions surrounding the decision to publish the proposed rule included consideration of the effects of the new procedures on various parties. The impact of the rule on bonding companies was considered. The conclusion was that the number of companies affected, and the adverse effects they might feel as a result of the no-work rider provision, were quite limited. Other adverse effects, such as possible increased welfare costs if aliens were denied work authorization, were thought to be minimal, because it was anticipated that allowances would be made for work authorization for aliens with citizen or permanent resident dependents or other substantial equities. Because the discussions revealed no major impact on any segment of the public, the rule as contemplated was not a "major rule" and therefore not subject to an impact review and analysis.

B. *5 U.S.C. 603 requires a "regulatory flexibility analysis".* Many commenters cited the Administrative Procedures Act (APA) in criticizing the proposed rule. Under this provision, an agency is required, before publishing a notice of proposed rule making, to "prepare and make available for public comment an initial regulatory flexibility analysis." This analysis is published with the notice of proposed rule making.

This analysis is not required if the head of the agency certifies, pursuant to 5 U.S.C. 553(f), that the rule will not have a significant economic effect on any "substantial number" of small businesses, organizations or governments. The Commissioner in fact made this certification.

In the period prior to the publishing of the proposed rule, the Service engaged in a good deal of internal discussion relating to both the content and the effect of the proposed rule. The decision to publish the rule was made after conversations among the Regional Commissioners and the Central Office Management. It was apparent during these deliberations that certain bonding companies might not consider the proposed rule to be in their best interest. It was also understood that the number of companies involved in immigration bond writing was quite small.

The claims made regarding adverse effects on governmental units fail to take into account the definitions contained in the regulatory flexibility provisions. It is not necessary for an agency to take into account costs to the Federal or State governments. The analysis by its clear terms applies to "small governmental jurisdictions" such as cities, counties, towns and villages, with a population of less than 50,000 persons (5 U.S.C. 601). None of the commenters seemed aware of the scope of the flexibility analysis in these terms. The costs the commenters project are thus based on faulty assumptions.

It is our conclusion that criticisms of the rule making procedures as they relate to the regulatory flexibility analysis are basically flawed because of the misconceptions as to the applicability of the provisions. In addition, it is our position that we made an "initial regulatory flexibility analysis" during con-

sideration of the rule making and that the management level discussions on this topic were sufficient, although not reduced to formal studies or writings.

5. The criticism that the standards to be applied in granting employment authorization were unclear

Some of the commenters provided useful criticisms of the factors to be considered in adjudicating a request for employment authorization. In particular, they questioned whether the Service had the authority to consider "dislocation" of American workers and the "impact" of such employment. Several commenters described this as more appropriately a function of the Department of Labor. These criticisms have substance to them. "Dislocation" is a term difficult to define and quantify. This factor is deleted from the final rule.

Factor (C) of the proposed rule, the "number of aliens involved" in unauthorized employment, was criticized because it did not specify if it referred to a particular industry or to the work force as a whole. It was also criticized as being part of the "dislocation" and "impact" determinations more suitably made by the Department of Labor. This factor is deleted from the final rule.

One commenter stated that two other factors of the proposed rule appeared to be contradictory: Factor (F), the "recentness" of the alien's arrival, and factor (G), the acceptance of employment "shortly after the alien's arrival." The commenter suggested that a long-term resident may have taken employment shortly after arrival, and inquired as to which factor would take precedence. Because of the ambiguity surrounding these factors, and because they are not essential considerations, they have been deleted from the final rule.

Comments on factors (H) and (I) were mixed. These factors are in the final rule, as they are important factors in the fair consideration of employment requests, and have been used in the general employment authorization regulations contained in 8 CFR 109.1(b).

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegation (Government Agencies), Bonding, Bonds, Surety bonds.

8 CFR Part 109

Aliens, Employment.

Accordingly, Title 8, Chapter I of the Code of Federal Regulations is amended as follows:

PART 103—POWER AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS

1. In § 103.6, paragraph (a)(2) is revised to read as follows:

§ 103.6 Surety bonds.

(a) * * *

(2) *Bond riders*—(i) *General.* Bond riders shall be prepared on Form I-351 and attached to Form I-352. If a condition to be included in a bond is not on Form I-351, a rider containing the condition shall be executed.

(ii) *Condition against unauthorized employment.* A condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding or bond posted for the re-

lease of an alien in exclusion proceedings, unless the District Director determines that employment is appropriate.

(iii) *Factors to be considered.* Only those aliens who upon application under § 109.1(b) of this chapter establish compelling reasons for granting employment authorization may be authorized to accept employment. Among the factors which may be considered when an application is made, are the following:

(A) Safeguarding employment opportunities for United States citizens and lawful permanent resident aliens;

(B) Prior immigration violations by the alien;

(C) Whether there is a reasonable basis for considering discretionary relief; and

(D) Whether a United States citizen or lawful permanent resident spouse or children are dependent upon the alien for support, or other equities exist.

* * * * *

PART 109—EMPLOYMENT AUTHORIZATION

2. In § 109.1, a new paragraph (b)(8) is added to read as follows:

§ 109.1 Classes of aliens eligible.

* * * * *

(b) * * *

(8) Any excludable or deportable alien who has posted an appearance and delivery bond may be granted temporary employment authorization if the District Director determines that employment is appropriate under § 103.6(a)(2)(iii) of this chapter.

* * * * *

(Sec. 103 of the Immigration and Nationality Act, as amended (8 U.S.C. 1103))

Dated: October 12, 1983.

Alan C. Nelson,

Commissioner, Immigation and Naturalization.

[FR Doc. 83-30061 Filed 11-4-83; 8:45 a.m.]

BILLING CODE 4410-10-M

APPENDIX G

8 C.F.R. 103.6 (before 1983 amendment)—

Surety bonds.

(a) *Posting of surety bonds*—(1) *Extension agreements; consent of surety; collateral security.* All surety bonds posted in immigration cases shall be executed in Form I-352, a copy of which, and any rider attached thereto, shall be furnished the obligor. A district director is authorized to approve a bond, a formal agreement to extension of liability of surety, a request for delivery of collateral security to a duly appointed and undischarged administrator or executor of the estate of a deceased depositor, and a power of attorney executed on Form I-312. All other matters relating to bonds, including a power of attorney not executed on Form I-312 and a request for delivery of collateral security to other than the depositor or his approved attorney in fact, shall be forwarded to the regional commission for approval.

(2) *Bond riders*—(i) *General.* Bond riders shall be prepared on Form I-351 and attached to Form I-352. In a condition to be included in a bond is not on Form I-351, a rider containing the condition shall be executed and forwarded with Form I-352 to the regional commissioner for approval.

(ii) *Condition against unauthorized employment.* In the discretion of the district director and with the prior approval of the regional commissioner, a condition barring unauthorized employment may be included in an appearance and delivery bond in connection with a deportation proceeding.

(iii) *Factors to be considered.* Among the factors to be considered in connection with the imposition of the bond condition barring unauthorized employment

are: Safeguarding employment opportunities for United States citizens and legal resident aliens; impact on and dislocation of American workers by alien's employment; the number of aliens involved in performing the unauthorized employment; prior immigration violations relating to acceptance of unauthorized employment by the alien; the likelihood of continued violations with the same employer; the recentness of the alien's arrival in the United States; the acceptance of the unauthorized employment shortly after such arrival; whether there is a reasonable basis for consideration of discretionary relief; whether a spouse or children are dependent on the alien for support, or other equities exist. These factors are intended as examples only and are not exclusive.

(b) *Acceptable sureties.* Either a company holding a certificate from the Secretary of the Treasury under 6 U.S.C. 6-13 as an acceptable surety on Federal bonds, or a surety who deposits cash or U.S. bonds or notes of the class described in 6 U.S.C. 15 and Treasury Department regulations issued pursuant thereto and which are not redeemable within 1 year from the date they are offered for deposit is an acceptable surety.

(c) *Cancellation*—(1) *Public charge bonds.* A public charge bond posted for an immigrant shall be cancelled when the alien dies, departs permanently from the United States, or is naturalized, provided he did not become a public charge prior to his demise, departure, or naturalization. The district director may cancel a public charge bond at any time if he finds that the immigrant is not likely to become a public charge. A bond may also be cancelled in order to allow substitution of another bond. Request for cancellation of a public charge bond shall be made on Form I-356.

(2) *Maintenance of status and departure bonds.* When the status of a nonimmigrant who has violated the conditions of his admission has been adjusted as a result of administrative or legislative action to that of a permanent resident retroactively to a date prior to the violation, any outstanding maintenance of status and departure bond shall be canceled. If an application for adjustment of status is made by a nonimmigrant while he is in lawful temporary status, the bond shall be canceled if his status is adjusted to that of a lawful permanent resident or if he voluntarily departs within any period granted to him. As used in this paragraph the term "lawful temporary status" means that there must not have been a violation of any of the conditions of the alien's nonimmigrant classification by acceptance of unauthorized employment or otherwise during the time he has been accorded such classification, and that from the date of admission to the date of departure or adjustment of status he must have had uninterrupted Service approval of his presence in the United States in the form of regular extension of stay or dates set by which departure is to occur, or a combination of both. An alien admitted as a nonimmigrant shall not be regarded as having violated his nonimmigrant status by engaging in employment subsequent to his proper filing of an application for adjustment of status under section 245 of the Act and Part 245 of this chapter. A maintenance of status and departure bond posted at the request of an American consular officer abroad in behalf of an alien who did not travel to the United States shall be canceled upon receipt of notice from an American consular officer that the alien is outside the United States and the nonimmigrant visa issued pursuant to the posting of the bond has been canceled or has expired.

(3) *Substantial performance.* Substantial performance of all conditions imposed by the terms of a bond shall release the obligor from liability.

(d) *Bond schedules*—(1) *Blanket-bonds for departure of visitors and transits.* The amount of bond required for various numbers of nonimmigrant visitors or transits admitted under bond on Forms I-352 shall be in accordance with the following schedule:

Aliens

1 to 4—$500 each.
5 to 9—$2,500 total bond.
10 to 24—$3,500 total bond.
25 to 49—$5,000 total bond.
50 to 74—$6,000 total bond.
75 to 99—$7,000 total bond.
100 to 124—$8,000 total bond.
125 to 149—$9,000 total bond.
150 to 199—$10,000 total bond.
200 or more—$10,000 plus $50 for each alien over 200.

(2) *Blanket bonds for importation of workers classified as nonimmigrants under section 101(a)(15)(H).* The following schedule shall be employed by district directors when requiring employers or their agents or representatives to post bond as a condition to importing alien laborers into the United States from the West Indies, the British Virgin Islands, or from Canada:

Less than 500 workers—$15 *each*
500 to 1,000 workers—$10 *each*
1,000 or more workers—$5 *each*

A bond shall not be posted for less than $1,000 or for more than $12,000 irrespective of the number of

workers involved. Failure to comply with conditions of the bond will result in the employer's liability in the amount of $200 as liquidated damages for each alien involved.

(e) *Breach of bond.* A bond is breached when there has been a substantial violation of the stipulated conditions. A final determination that a bond has been breached creates a claim in favor of the United States which may not be released or discharged by a Service officer. The district director having custody of the file containing the immigration bond executed on Form I-352 shall determine whether the bond shall be declared breached or cancelled, and shall notify the obligor on Form I-323 or Form I-391 of the decision, and, if declared breached, of the reasons therefor, and of the right to appeal in accordance with the provisions of this part.

8 C.F.R. 109.1 (before 1983 amendment).

Classes of aliens eligible.

(a) *Aliens authorized employment incident to status.* The employment authorization is limited solely to the extent and conditions described for the corresponding classifications in section 101(a)(15) of the Act, 8 CFR Part 214, 22 CFR Part 41, and 22 CFR 514.24. The following classes of aliens are authorized to be employed in the United States as a condition of their admission or subsequent change to one of the indicated classes, and specific authorization need not be requested:

(1) A lawful permanent resident alien.

(2) An alien admitted to the United States as a refugee under section 207 of the Act.

(3) An alien paroled into the United States as a refugee.

(4) An alien granted asylum under section 208 of the Act.

(5) An alien admitted to the United States as a nonimmigrant fiance or fiancee.

(6) An alien admitted in one of the following classifications, or whose status has been changed to such classification under section 247 or 248 of the Act:

(i) A foreign government official (A-1), or (A-2).

(ii) An employee of a foreign government official (A-3).

(iii) A nonimmigrant visitor for business (B-1).

(iv) A nonimmigrant crewman (D-1).

(v) A nonimmigrant treaty trader or investor (E-1), or (E-2).

(vi) A representative of an international organization (G-1), (G-2), (G-3), or (G-4).

(vii) A personal servant of an employee or representative of an international organization (G-5).

(viii) A temporary worker or trainee (H-1), (H-2), or (H-3).

(ix) An information media representative (I).

(x) An exchange visitor (J-1).

(xi) An intra-company transferee (L-1).

(b) *Aliens who must apply for work authorization.* Any alien within a class of aliens described in this section must apply for work authorization to the district director in whose district the alien resides:

(1) Any alien maintaining a lawful nonimmigrant status in one of the following classes may be granted permission to be employed:

(i) Alien spouse or unmarried dependent son or daughter of a foreign government official (A-1), or (A-2) as provided in § 214.2(a) of this chapter.

(ii) Alien nonimmigrant student (F-1) as provided in § 214.2(f) of this chapter.

(iii) Alien spouse or an unmarried dependent son or daughter of an officer or employee of an international organization (G-4) as provided in § 214.2(g) of this chapter.

(iv) Alien spouse of an exchange visitor (J-2) as provided in § 214.2(j) of this chapter.

(2) Any alien who has filed a non-frivolous application for asylum pursuant to Part 208 of this chapter may be granted permission to be employed for the period of time necessary to decide the case.

(3) Any alien who has properly filed an application for adjustment of status to permanent resident alien may be granted permission to be employed for the period of time necessary to decide the case.

(4) Any alien paroled into the United States temporarily for emergent reasons or for reasons deemed strictly in the public interest: *Provided*, The alien establishes an economic need to work.

(5) Any alien who has applied to an immigration judge under § 242.17 of this chapter for suspension of deportation pursuant to section 244(a) of the Act may be granted permission to be employed for the period of time necessary to decide the case: *Provided*, The alien establishes an economic need to work.

(6) Any deportable alien granted voluntary departure, either prior to hearing or after hearing, for reasons set forth in § 242.5(a)(2) (v), (vi), or (viii) of this chapter may be granted permission to be employed for that period of time prior to the date set for voluntary departure including any extension granted beyond such date. Factors which may be considered in granting employment authorization to an alien who has been granted voluntary departure:

(i) Length of voluntary departure granted;

(ii) Dependent spouse and/or children in the United States who rely on the alien for support;

(iii) Reasonable chance that legal status may ensue in the near future; and

(iv) Reasonable basis for consideration of discretionary relief.

(7) Any alien in whose case the district director recommends consideration of deferred action, an act of administrative convenience to the government which gives some cases lower priority: *Provided*, The alien establishes to the satisfaction of the district director that he/she is financially unable to maintain himself/herself and family without employment.

(c) *Basic criteria to establish economic necessity.* Title 45—Public Welfare, Poverty Income Guidelines, 45 CFR 1060.2 shall be used as the basis criteria to establish economic necessity for employment authorization requests where the alien's need to work is a factor. The applicant shall submit a signed statement listing his/her assets, income, and expenses as evidence of his/her economic need to work. Permission to work granted on the basis of the applicant's statement may be revoked under § 109.2 upon a showing that the information contained in the statement was not true and correct.

(Sec. 103, 245(c); (8 U.S.C. 1103, 1255(c))) [46 FR 55921, Nov. 13, 1981]

8 U.S.C. 1103(a) provides:

Powers and duties of the Attorney General and Commissioner; appointment of Commissioner

The Attorney General shall be charged with the administration and enforcement of this chapter and

all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling. He shall have control, direction, and supervision of all employees and of all the files and records of the Service. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such intructions;[2] and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter. He is authorized, in accordance with the civil-service laws and regulations and chapter 51 and subchapter III of chapter 53 of title 5, to appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this chapter; he may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service. He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper. He is authorized to confer or impose upon any employee of the United States, with

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[2] So in original. Probably should read "instruction."

the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service. He may, with the concurrence of the Secretary of State, establish officers of the Service in foreign countries; and, after consultation with the Secretary of State, he may, whenever in his judgment such action may be necessary to accomplish the purposes of this chapter, detail employees of the Service for duty in foreign countries.

8 U.S.C. 1182 provides in pertinent part:

Excludable aliens

(a) General classes

Except as otherwise provided in this chapter, the following classes of aliens shall be excluded from admission into the United States:

* * * * *

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the

United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 1153(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(7) of this title;

* * * * *

8 U.S.C. 1251 provides in pertinent part—

Deportable aliens

(a) General classes

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * *

8 U.S.C. 1252—

Apprehension and deportation of aliens

(a) Arrest and custody; review of determination by court

Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the

Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

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In The

Supreme Court of the United States

October Term, 1986

Immigration and Naturalization Service, *et al.*,

Petitioners,

v.

National Center for Immigrants' Rights, *et al.*,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
SUMMARY OF STATEMENT	1
STATEMENT	4
I. THE IMMIGRATION REFORM AND CONTROL ACT OF 1986 HAS ELIMINATED ANY IMPACT THE DECISIONS BELOW MAY HAVE HAD ON PETITIONERS' ABILITY TO REGULATE EMPLOYMENT	6
II. ENACTMENT OF THE IMMIGRATION REFORM AND CONTROL ACT OF 1986 MAKES IMPROVIDENT REVIEW OF THE PROPOSED QUESTION	9
III. THERE HAS BEEN NO SIGNIFICANT LITIGATION CONCERNING PETITIONERS' AUTHORITY TO CONDITION RELEASE ON BOND FOR 34 YEARS; THIS COURT HAS UNIFORMLY DENIED CERTIORARI IN CRIMINAL CASES PRESENTING ANALAGOUS ISSUES	10
IV. THE ISSUE PRESENTED BY THE FACTS IS NOT SIMPLY WHETHER PETITIONERS MAY SET BOND CONDITIONS PROHIBITING WORK, BUT WHETHER THE INS MAY INCARCERATE WITHOUT BOND ALLEGED, BUT UNPROVED, DEPORTABLE ALIENS SOLELY BECAUSE THEY NEED TO WORK	12
V. THE DECISIONS BELOW WERE CORRECTLY DECIDED AND ACCORD WITH SETTLED LAW	14
VI. CONCLUSION	17

TABLE OF AUTHORITY

Page

CASES

Canale v. United States, No. 87-1760, 53 U.S.L.W. 3911 (July 1, 1985) 11

C.M.K. v. Richardson Attorney General, 371 F. Supp. 183 (E.D. Mich. 1974) 13

Carlson v. Landon, 342 U.S. 524 (1952) 4

DeCanas v. Bica, 424 U.S. 351 (1976) 2

Gernstein v. Pugh, 420 U.S. 103 (1975) 13

Ingraham v. Wright, 430 U.S. 651 (1977) 13

INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) 6

INS v. Phinpathya, 464 U.S. 183 (1984) 17

Krzyske v. United States, No. 86-352, 86 U.S.L.W. 3558 (Nov. 17, 1986) 11

Liacakos v. Kennedy, 195 F. Supp. 630 (D.D.C. 1961) 13

Rippetoe v. Mississippi, No. 83-503, 52 U.S.L.W. 3386 (Nov. 14, 1983) 11

Schall v. Martin, 467 U.S. 253 (1984) 12

Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) 2

United States v. Witkovich, 353 U.S. 194 (1957) 14

Whetstone v. INS, 561 F.2d 1303 (9th Cir. 1977) 13

Woodby v. Immigration & Naturalization Service, 385 U.S. 276 (1966) 5

Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) 12

STATUTES AND REGULATIONS

Internal Security Act of 1950, § 2(15), 64 Stat. 987 14

TABLE OF AUTHORITY—Continued

Page

Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.* 5

Immigration Reform and Control Act of 1986, P.L. 99-603 ..... *passim*

8 U.S.C. 1182(a)(14) 10

8 U.S.C. 1251(a) 4

8 U.S.C. 1252(a) 4, 5, 10

8 U.S.C. 1252(d)(3) 14

8 U.S.C. 1324A 6, 15

8 U.S.C. 1324A(a)(1), (2) 8

8 U.S.C. 1324A(e)(4) 7

8 U.S.C. 1324A(f) 8

8 U.S.C. 1324A(h)(2) 16

8 C.F.R. pt. 109 9

8 C.F.R. 109.1 10

8 C.F.R. 109.2 10

MISCELLANEOUS

Congressional Record, July 17, 1949, 10456 16

House Comm. on the Judiciary, H.R. Rep. No. 99-682, pt. 1, 99th Cong., 2d Sess. 58, *reprinted in* [1986] U.S. Code Cong. & Ad. News 5649 *et seq.* 16

United States Commission of Civil Rights, The Tarnished Golden Door: Civil Rights Issues in Immigration 90-91 (1980) 5

SUMMARY OF STATEMENT

A.

On November 6, 1986, five months after the Ninth Circuit Court of Appeals filed its decision, the President signed the Immigration Reform and Control Act of 1986. This legislation for the first time regulates the employment of aliens within the United States.

This development has the following implications:

1. The 1986 legislation fully regulates the employment of aliens through civil fines of up to $10,000 for each unauthorized worker knowingly hired and criminal penalties of up to six months imprisonment for employers who engage in a pattern or practice of violations. Any impact the decisions below *may* have had on petitioners' ability to regulate employment is now insignificant.

2. Petitioners have recently issued draft regulations implementing the 1986 legislation.[1] The draft regulations indicate that the agency contemplates significant changes in the employment authorization regulations as a result of the "employer sanctions" provisions of the new immigration law. The courts below ruled in part as they did because the challenged work authorization procedures failed to provide persons facing detention solely because of their need to work a due process hearing. Whether the courts below would bar no-work bond conditions set in accordance with the revised procedures will be known only

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[1] A copy of the draft regulations has been lodged with the Clerk of the Court. Petitioners have recently announced that proposed regulations are about to be published in the Federal Register.

if and when the regulations are published, challenged, and evaluated by lower courts.

3. At the time the courts below ruled, immigration law evinced " 'at best evidence of peripheral concern with the employment of illegal entrants.' " *National Center for Immigrants' Rights, Inc. v. INS*, 644 F.Supp. 5, 9 (C.D. Cal. 1985), *reprinted in* Petitioners' Appendix A at 9a-10a; *National Center for Immigrants' Rights v. INS*, 791 F.2d 1351, 1355 (9th Cir. 1984), *reprinted in* Petitioners' Appendix B at 22a, *quoting Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984), and *DeCanas v. Bica*, 424 U.S. 351, 360 (1976). Accordingly, they reasoned that detaining without bond every alleged alien unable to refrain from employment during deportation proceedings did not further a clearly declared legislative purpose.

In contrast, current legislation expressly regulates employment. Although respondents contend that bond conditions are still inappropriate to employment regulation, whether the courts below would hold today as they did prior to the 1986 legislation is uncertain.

B.

The issue presented by the facts is not simply whether petitioners' have statutory authority to use bond conditions to regulate employment. Although both the district and appellate courts reasoned that appropriate bond conditions tend to ensure appearance at administrative proceedings and availability for deportation, or protect the national security, the holdings of both courts rest on factual findings concerning petitioners' approach to bond conditions barring employment.

Among the findings of the district court: (1) The challenged regulations impose "a blanket [bond] condition which inherently precludes any individualized determination." *National Center for Immigrants' Rights, Inc. v. INS,* No. CV-83-7927, [Summary Judgment] Order, March 5, 1985, *reprinted in* Petitioners' Appendix B at 15a; and (2) delays before administrative review of "no-work" bond conditions often extended "several weeks." *National Center for Immigrants' Rights, Inc. v. INS,* No. CV-83-7927, *Order re Preliminary Injunction,* Dec. 16, 1983, *reprinted in* Petitioners' Appendix E at 47a-48a.

Even then, the hearing provided is, in petitioners' words, only an "informal proceeding" in which no testimony is taken and no record made. Reporters Transcript of December 16, 1983, at 130; Clerk's Record at 16. Although a released person may subsequently, only for "compelling reasons", apply for issuance of employment authorization, the evidence "clearly indicates that this review is not designed to comport with due process requirements." Petitioners' Appendix E at 48a.[2]

C.

Other than the case at bar, petitioners' setting of bond conditions unrelated to ensuring future presence at

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[2] Petitioners' dissatisfaction with the decisions below is largely with the accuracy of these factual findings. *E.g.,* Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit ["Petitioners' Brief"] at 19 ["the courts below have not accurately characterized the regulation as precluding individual determinations"]; *id.* at 25 ["The internal inconsistency in the opinions of both lower courts appears to result from several errors both factual and legal . . . [T]he regulation does not '[d]o away with individualized determinations' "].

administrative hearings or protecting national security has engendered *no* litigation in this Court for thirty-four years. Issues concerning bail conditions unrelated to ensuring the presence of criminal defendants have generally been insufficiently important to merit review by this Court. This case presents nothing to distinguish it.

D.

The decisions below are entirely consistent with the opinions of this Court. Detention without bail under the Internal Security Act was approved in *Carlson v. Landon,* 342 U.S. 524 (1952), to protect national security and only upon an individualized showing of Communist Party membership and indoctrination of others. 342 U.S. at 530. Petitioners' *blanket* imposition of no-work bond conditions goes far beyond *Carlson.* The record contains no evidence that the challenged regulations protect national security or that they bear any rational relationship to the stated purpose of preserving jobs for citizens.

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STATEMENT

Pursuant to 8 U.S.C. 1252(a), Immigration and Naturalization Service ("INS") agents arrest persons whom they suspect may be aliens within one of the classes of deportable aliens set out in 8 U.S.C. 1251(a).[3] Such per-

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[3] Persons are taken into custody upon probable cause they are (1) aliens and (2) deportable from the United States. This preliminary determination, often made by INS officers in an

(Continued on following page)

sons are generally entitled to release on bond pending administrative and judicial proceedings to determine whether they are deportable from the United States.[4]

In 1983, relying upon section 242(a) of the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. section 1252(a), petitioners for the first time since enactment of the section some thirty years earlier, began admitting all arrested persons to bail only upon condition they not work. No due process hearing was held either before or after imposition of no-work bond conditions to determine whether an arrestee was in fact entitled to be in the United States or to work. Those who worked after release forfeited their bond and were re-incarcerated without bail.

Petitioners advance two reasons why their petition should be granted: First, they suggest that disallowing blanket no-work bond conditions presents an important

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atmosphere of "confusion and pandemonium," United States Commission on Civil Rights, The Tarnished Golden Door: Civil Rights Issues in Immigration 90-91 (1980), provides but minimal assurance that a person is either an alien or deportable. As recently stated by this Court, "Large numbers" of suspected deportable aliens "are often arrested at one time, and conditions [during INS arrest activities] are understandably chaotic." *INS v. Lopez-Mendoza*, 468 U.S. 1032 [104 S.Ct. 3479, 3487] (1984).

[4] A person may be only deported following a due process hearing at which the INS bears the burden of proving both alienage and deportability by "clear, unequivocal and convincing" evidence. *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276, 286 (1966).

hinderance to their efforts to regulate such employment.[5] Second, they argue that the decisions below are wrong.

The importance of the question petitioners raise is addressed in sections I and II of this memorandum. Sections III and IV set out additional grounds why now granting the instant petition would be improvident. The merits of the decisions below are addressed in section V.

I.

THE IMMIGRATION CONTROL AND REFORM ACT OF 1986 HAS ELIMINATED ANY IMPACT THE DECISIONS BELOW MAY HAVE HAD ON PETITIONERS' ABILITY TO REGULATE EMPLOYMENT.

The Immigration Reform and Control Act of 1986 ["IRCA"], P.L. 99-603, posits sweeping revisions and additions to the INA, 8 U.S.C. 1101 *et seq.* Title I of the IRCA adds section 274A to the Immigration and Nationality Act. 8 U.S.C. 1324A. The new section is a comprehensive treatment of alien employment and for the first time makes unlawful the knowing employment of persons not authorized to work in the United States. 8 U.S.C.

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[5] Although the challenged regulation was ostensibly promulgated to protect the American labor force, petitioners failed to submit a single piece of evidence linking the challenged regulations to the protection of U.S. workers. On the other hand, respondents' "evidence tend[ed] to show that employment by aliens awaiting deportation proceedings does not affect American unemployment." *National Center for Immigrants' Rights, Inc., et al. v. Immigration and Naturalization Service, et al.*, No. 84-5504, Opinion, September 28, 1984, *reprinted in* Petitioners' Appendix D at 38a.

1324A(a)(1), (2).[6] The Attorney General advised Congress that through "employer sanctions" the "entry of illegal aliens into jobs" in the United States "can be addressed effectively." H.R. Report 99-682(I), 99th Cong. 2d Sess. 105 (1986).[7]

Employers who violate these restrictions face civil fines of up to $10,000. 8 U.S.C. 1324A(e)(4).[8] Contu-

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[6] (a) Making Employment of Unauthorized Aliens Unlawful——

(1) In general.—It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States—

(A) an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment, or

(B) an individual without complying with the requirements of subsection (b).

(2) Continuing Employment.—It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

[7] The legislative history of IRCA provides that "the [House Judiciary] Committee remains convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens." H.R. Rep. 99-682, *supra*, at 46.

[8] (4) Cease and desist order with civil money penalty for hiring, recruiting, and referral violations.—With respect to a violation of subsection (a)(1)(A) or (a)(2), the order under this subsection—

(A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of—

(Continued on following page)

macious violators are subject to criminal penalties and civil injunctions. 8 U.S.C. 1324A(f).[9]

Whereas bond conditions may previously have been of arguable value in controlling unauthorized employment, the new legislation directly and effectively regulates employment. Any contribution bond conditions may have

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(i) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred,

(ii) not less than $2,000 and not more than $5,000 for each such alien in the case of a person or entity previously subject to one order under this subparagraph, or

(iii) not less than $3,000 and not more than $10,000 each such alien in the case of a person or entity previously subject to more than one order under this subparagraph;

. . .

[9] (f) Criminal Penalties and Injunctions for Pattern or Practice Violations.—

(1) Criminal penalty.—Any person or entity which engages in a pattern or practice of violations of subsections (a)(1)(A) or (a)(2) shall be fined not more than $3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.

(2) Enjoining of pattern or practice violations.—Whenever the Attorney General has reasonable cause to believe that a person or entity is engaged in a pattern or practice of employment, recruitment, or referral in violation of paragraph (1)(A) or (2) of subsection (a), the Attorney General may bring a civil action in the appropriate district court of the United States requesting such relief, including a permanent or temporary injunction, restraining order, or other order against the person or entity, as the Attorney General deems necessary.

made—and the question petitioners propose—is now of little importance.[10]

II.

ENACTMENT OF THE IMMIGRATION CONTROL AND REFORM ACT OF 1986 MAKES IMPROVIDENT REVIEW OF THE PROPOSED QUESTION.

In February, 1987, petitioners released draft regulations implementing the IRCA. The draft regulations will add new part 245A to Title 8 of the Code of Federal Regulations. Much of 8 C.F.R. part 109—the procedural work authorization regulations found inadequate by the courts below—has been transferred to new part 245A.

Other than directing aliens not otherwise authorized to work to "apply for work authorization to the district

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[10] Even without the controls provided by the IRCA, the record below establishes that bond conditions are wholly ineffective in controlling unauthorized employment. Dr. Leo Chavez, a leading migration expert compared the contribution such conditions make toward protecting U.S. workers to "making a dam out of a bucket of sand and trying to stop all the rivers that flow to the ocean." Clerk's record 11 at 90. Dr. Patricia Kelly, an expert on labor migration, testified she knew of no evidence that bond conditions significantly decrease the unemployment of authorized workers. *Id.* at 124. She characterized the impact petitioners' regulations would have on unemployment as so speculative as to as amount to "throwing dice." *Id.* at 114, 116. Petitioners offered *no* evidence in the district court establishing any link between the challenged regulations and protecting the U.S. workforce.

Concurring, Congress did not include bond conditions among the IRCA employment controls, though the decisions of the courts below had been rendered prior to the enactment of the IRCA.

director . . . ," the draft indicates that employment authorization procedures are "to be developed."[11]

This case was decided as it was in part because petitioners lacked adequate, reasonably prompt procedures for adjudicating work authorization requests from persons whose bonds included automatic "no-work" conditions. The 1986 legislation has required sweeping changes to these procedures. Reviewing the propriety of superceded regulations would be academic, evaluating unknown future regulations, precipitous.

III.

THERE HAS BEEN NO SIGNIFICANT LITIGATION CONCERNING PETITIONERS' AUTHORITY TO CONDITION RELEASE ON BOND FOR 34 YEARS; THIS COURT HAS UNIFORMLY DENIED CERTIORARI IN CRIMINAL CASES PRESENTING ANALAGOUS ISSUES.

If the importance of an issue may be judged by the amount of litigation it engenders, petitioners' question is truly lacking.

The statutes concerning excluding aliens coming to the United States to work, 8 U.S.C. 1182(a)(14), and granting petitioners authority to set bond conditions, 8 U.S.C.

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[11] Draft regulations at 10. As for the criteria used in granting or withholding work authorization, the draft regulations retain only the first sentence of 8 C.F.R. 109.1(c), which sets standards for economic need. The remainder of the regulation, which provides for (1) granting work authorization requests on the basis of applicants' income statements and (2) revoking work authorization for false statements in income statements, is omitted. 8 C.F.R. 109.2, which also addresses revoking authorization, is omitted in its entirety.

1252(a), have existed for over thirty-four years, yet petitioners have cited *no* litigation over their authority to set bond conditions unrelated to ensuring detainees' presence at future hearings or protecting the national security.[12]

The dearth of litigation in the lower courts has provided few opportunities for this Court to decide whether to undertake plenary consideration of such issues. The closest analogy is to the Court's view of similar issues arising in criminal law.

In *Krzyske v. United States*, No. 86-352, the Court was asked to consider whether the Bail Reform Act, 18 U.S.C. 3142, authorizes courts to condition bail pending appeal on the defendant's filing tax returns and paying taxes due. 86 U.S.L.W. 3299 (Oct. 28, 1986). Certiorari was denied. 86 U.S.L.W. 3558 (Nov. 17, 1986).

In *Canale v. United States*, No. 84-1760, the Court declined to review inter-circuit conflicts over the Bail Reform Act's requirement that defendants who seek bail pending appeal show a substantial question likely to result in reversal or a new trial. 18 U.S.C. 3143(b)(2); 53 U.S.L.W. 3911 (July 1, 1985); *cf., Rippetoe v. Mississippi*, No. 83-503, 52 U.S.L.W. 3386 (Nov. 14, 1983) [whether Mississippi Supreme Court rules unconstitutionally deny bail; certiorari denied].

Bail conditions are more frequently litigated and affect far more persons in the criminal setting than in the

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[12] Petitioners suggest that the district court's treatment of this action as a class action is to blame for their being no other lower court decisions involving the issue they propose. At best, this argument accounts for but three of thirty-four years' inactivity.

immigration setting. Petitioners offer no reason why their question is nonetheless of greater importance.

IV.

THE ISSUE PRESENTED BY THE FACTS IS NOT SIMPLY WHETHER PETITIONERS MAY SET BOND CONDITIONS PROHIBITING WORK, BUT WHETHER THE INS MAY INCARCERATE WITHOUT BOND ALLEGED, BUT UNPROVED, DEPORTABLE ALIENS SOLELY BECAUSE THE NEED TO WORK.

Although petitioners cast the issue here as whether no-work conditions may be imposed at all,[13] the courts below clearly disapproved on the facts petitioners' "blanket" approach to setting such conditions.[14]

Petitioners must observe the requirements of due process imposed by the Fifth Amendment to the United States Constitution, particularly where they would deprive persons of personal liberty. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-50 (1950). "If the 'liberty' protected by the Due Process Clause means anything, it means freedom from physical restraint." *Schall v. Martin*,

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[13] Elsewhere, petitioners contend that "the court of appeals and the district court . . . acknowledged that in some cases a 'no-unauthorized-work' condition on bond might be appropriate." Petitioners' Brief at 25.

[14] The Court of Appeals pointed out that "[e]arlier regulations and INS case law have required individualized determinations before the inclusion of a no-work condition in the bond." Petitioners' Appendix, at 10a.

467 U.S. 253 [104 S.Ct. 2403, 2423] (1984) (Marshall, J., dissenting); *Ingraham v. Wright,* 430 U.S. 651, 673-74 (1977).

As the district court found, however, under the disapproved regulations, "all aliens who [posted] bond [were] automatically subjected to the no-work condition." Petitioners' Appendix E at 49a. Moreover, "the delay between the earliest time the detainee could be released and a review of the bond condition by the Immigration Judge [varied] from a few hours to several weeks, largely depending upon the location of the hearing." *Ibid.* As noted above, Petitioners have conceded that the bond redetermination hearing is not a due process hearing.

Petitioners offer only that their blanket setting of no-work bond conditions "makes sound administrative sense . . ." Petitioners' brief at 16. Nonetheless, only a *compelling* governmental interest will justify infringing the right to be free from physical restraint. *Gernstein v. Pugh,* 420 U.S. 103, 113-14 (1975).

Importantly, persons arrested by the INS and required to appear in deportation hearings are often entitled to be and remain in the United States.[15] Incarcerating persons alleged, but unproved, to be deportable aliens entirely without due process must clearly be more than an administrative convenience.

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[15] *See, e.g., Whetsone v. INS,* 561 F.2d 1303 (9th Cir. 1977) (deportation reversed, respondent entitled to permanent resident alien status); *Liacakos v. Kennedy,* 195 F.Supp. 630 (D.D.C. 1961) (deportation order set aside, respondent a "natural born citizen of the United States"); *C.M.K. v. Richardson, Attorney General,* 371 F.Supp. 183 (E.D. Mich. 1974) (deportation order reversed, respondent a "derivative citizen of the United States").

V.

THE DECISIONS BELOW WERE CORRECTLY DECIDED AND ACCORD WITH SETTLED LAW.

Neither Congress nor this Court has ever sanctioned incarceration without bail as a means to regulate employment. Indeed, the only purpose for which such incarceration has been approved is to counter a "clear and present danger to the security of the United States . . ." Internal Security Act of 1950, § 2(15), 64 Stat. 987.

In *Carlson v. Landon, supra,* the Court narrowly approved detention without bail under the Internal Security Act of alien communists. The Court held such detention permissible because national security was at stake and it had been shown that the specific detainees were Communist Party members who had participated in the indoctrination of others. 342 U.S. at 541.

When national security is not threatened, however, neither this Court nor Congress has ever approved incarceration without bail of persons not accused or convicted of crime. Five years after *Carlson,* in *United States v. Witkovich,* 353 U.S. 194 (1957), the Court held that the "eloquently" broad language of 8 U.S.C. 1252(d)(3)[16]

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[16] Any alien, against whom a final order of deportation . . . has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision . . . (3) to give information under oath as to his nationality, circumstances, habits, associations and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; . . .

does not authorize the Attorney General to require aliens under *final order of deportation* to give information unrelated to ensuring their availability for deportation:

> When Congress did want to deal with the far-flung interest of national security or the general undesirable conduct of aliens, it gave clear indication of this purpose . . . [*I*]*t is a permissible and therefore an appropriate construction to limit the statute to . . . all questions reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens whose deportation is overdue.*

353 U.S. at 200-202 (emphasis added).[17]

Far from having indicated that bail conditions may be used to regulate employment, Congress has specifically sought to confine such regulation to the provisions of the 1986 legislation: "The provisions of this section [8 U.S.C. 1324A] preempt any State or local law imposing civil or criminal sanctions (other than through licensing and sim-

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[17] In support of their sweeping construction of section 242, petitioners quote language from one report in the legislative history of H.R. 10, 81st Cong., 1st Sess., stating that the Attorney General shall have "untrammeled discretion to impose such conditions or terms as he sees fit in releasing an alien under bond." Petitioners' Brief at 6.

Petitioners fail to cite other legislative materials that shed additional light on the scope of section 242. The language they argue authorizes detention without bail to control employment was offered for "one single purpose: the restoration of the sovereign power of our Government to deport criminal aliens . . ." Congressional Record, July 17, 1949, at 10456. Other than criminals, the debates over detention powers concerned "subversives." *Id.*, at 10449. Nowhere does the legislative history contemplate that persons other than criminals and subversives would be incarcerated without bail pursuant to section 242.

ilar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. 1324A(h)(2).

Although section 1324A(h)(2) does not expressly apply to federal agencies, it unquestionably embodies congressional concern that employment controls be limited to those prescribed by the IRCA. Underscoring this is that Congress preserved all collateral employment-related rights of unauthorized workers:

> It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. . . .

House Comm. on the Judiciary, H.R. Rep. No. 99-682, pt. 1, 99th Cong., 2d Sess. 58, *reprinted in* [1986] U.S. Code Cong. & Ad. News 5649, *et seq.*

Although obvious that withdrawing employment-related rights from unauthorized workers could help deter proscribed employment, Congress preserved such rights, striking a balance between deterring *employers* from hir-

ing unauthorized workers and fully protecting the rights of *employees.*[18]

Going far beyond withdrawing employment-related rights, petitioners would abridge the personal liberty not of employers, but of employees, an approach plainly at odds with both the spirit and letter of the IRCA.

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VI.

CONCLUSION

Petitioners transparently argue that Congress simply hasn't done enough to control employment. Unwilling to settle for less than "untrammelled" authority to summarily deprive persons alleged, but unproved, to be deportable aliens of all personal liberty, petitioners propose a quantum leap from what Congress has authorized.

Petitioners' suggestion that this Court "construe the Act to broaden the Attorney General's discretion analogously would shift authority . . . from Congress to the INS and, eventually, as is evident from the experience in this case, to the courts. [The Court] must therefore reject [petitioner's] suggestion as impermissible in our tripartite scheme of Government." *INS v. Phinpathya,* 464 U.S. 183, 195 (1984).

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[18] With but few exceptions, Congress has never conditioned eligibility for any statutory benefits on refraining from unauthorized employment. *See, e.g.,* INA secs. 244, 245, 243(h), 8 U.S.C. secs. 1254, 1255, 1253(h).

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 86-1207

In the Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
PETITIONERS

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

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TABLE OF AUTHORITIES

Cases:	Page
Amanullah v. *Nelson*, 811 F.2d 1 (1st Cir. 1987)	6
Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883 1984)	7
Constitution, statutes and regulations:	
U.S. Const. Amend. V (Due Process Clause)	3
Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359:	
§ 101:	
§ 274A (i) (1) (B), 100 Stat. 3368-3369	7
§ 274A (i) (2), 100 Stat. 3369	7
8 U.S.C. 1103	6
8 U.S.C. 1182 (a) (14)	5
8 U.S.C. 1252 (a)	6
8 C.F.R.:	
Section 103.6 (a) (2)	1, 2, 3, 4
Pt. 109	2, 3, 4-5
Pt. 274a, Subpt. B	2
Miscellaneous:	
52 Fed. Reg. (Mar. 19, 1987):	
pp. 8740-8795	3
p. 8763	2
pp. 8766-8767	2
p. 8767	3
H.R. Rep. 1192, 81st Cong., 1st Sess. (1949)	6
H.R. Rep. 99-682, 99th Cong., 2d Sess. Pt. 1 (1986)	5, 6, 7
S. Rep. 2239, 81st Cong., 2d Sess. (1950)	6
S. Rep. 99-132, 99th Cong., 1st Sess. (1985)	5

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IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

The permanent, nationwide injunction entered by the district court in this case, and affirmed by the court of appeals, was based entirely and exclusively on the holdings of those courts that 8 C.F.R. 103.6 (a)(2), as promulgated by the Immigration and Naturalization Service (INS) in 1983, is beyond the statutory authority of the Attorney General. It is on that issue of statutory interpretation that we have petitioned for certiorari.

Respondents make no serious attempt to defend the statutory interpretation adopted by the court of appeals.[1] Instead, they offer various reasons why (they

[1] Respondents' only discussion of the merits of the statutory question (Br. in Opp. 14-17) eschews entirely the reasoning of the courts below and relies instead on a fundamental mis-

assert) the Court should not examine the issue. Respondents' desire to avoid having this Court look at the merits of the statutory question is understandable, given that its resolution by the courts below was erroneous when rendered and since then—according to respondents themselves (Br. in Opp. 1-2)—has been undercut a great deal more by the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. But, in seeking to achieve that end, respondents do much to obfuscate and little to clarify the issue.

First, respondents state that "the agency contemplates significant changes in the employment authorization regulations as a result of the 'employer sanctions' provisions of the new immigration law" (Br. in Opp. 1). That statement is factually erroneous. Section 103.6(a)(2), the regulation that the courts below invalidated, has not been changed, no proposal to change it has been circulated or published, and INS has no plans to change it. Related regulations found in Part 109 of 8 C.F.R. have been proposed to be transferred—*without change*—to Subpart B of a new Part 274a of 8 C.F.R. See 52 Fed. Reg. 8763, 8766-8767 (Mar. 19, 1987).[2] There are no "super-

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characterization of the challenged regulation. What that regulation does is to condition release of an arrestee on his or her agreement not to break the law by engaging in unauthorized employment (see Pet. 2-5, 17, 21 n.13, 25 n.14). The regulation that respondents attack in their discussion of the merits—one that sanctions incarceration without bail—simply is not the regulation at issue.

[2] In the brief in opposition at 10 n.11, respondents make certain representations about proposed changes to Part 109, based on a preliminary working draft of regulations circulated informally by INS shortly after enactment of the IRCA. That preliminary working draft was superseded by draft

ceded [*sic*] regulations" or "unknown future regulations" (Br. in Opp. 10) at issue in this case.

Second, respondents state that "[t]he courts below ruled in part as they did because the challenged work authorization procedures failed to provide persons facing detention solely because of their need to work a due process hearing" (Br. in Opp. 1; see also *id.* at 10). That statement misrepresents the basis of the permanent injunction at issue. Although the district court stated at the preliminary injunction stage that respondents had a "fair chance" of prevailing on their theory that 8 C.F.R. 103.6(a)(2) was inadequate to satisfy the Due Process Clause (Pet. App. 47a-48a), the court of appeals did not reach that issue in affirming the preliminary injunction (*id.* at 38a n.2), and neither the district court nor the court of appeals reached that issue in ruling on the permanent injunction (see *id.* at 4a, 13a-14a).[3]

Third, respondents err in stating that "the holdings of both courts [below] rest on factual findings

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regulations made publicly available on March 5 and published in the *Federal Register* on March 19 (52 Fed. Reg. 8740-8795). The published draft regulations are contrary in every respect to respondents' representations in footnote 11. See *id.* at 8767. Moreover, neither the preliminary working draft nor the published draft regulations propose any change to Section 103.6(a)(2).

[3] Respondents' due process argument (Br. in Opp. 12-13), moreover, is wholly without merit. The issue to be resolved in deciding whether to impose a bond condition is not whether the arrestee is deportable. Rather, the district director determines only whether the arrestee is authorized to work—an extremely simple matter (see Pet. 17 & n.12)—and, if not, whether, under Part 109, the arrestee should be relieved (pending deportation proceedings) from his preexisting legal obligation *not* to work.

concerning petitioners' approach to bond conditions barring employment" (Br. in Opp. 2). The permanent injunction was entered by the district court pursuant to a grant of summary judgment to respondents (Pet. App. 12a), and the court made no factual findings. The district court's statement that the challenged regulation imposes "a blanket [bond] condition which inherently precludes any individualized determination" (*id.* at 15a) is not, as respondents claim (Br. in Opp. 3), a factual finding but a conclusion of law—and, as we showed in our petition (at 8-9, 17-18, 25), an incorrect one. Nor did the district court "find" that "delays before administrative review of 'no-work' bond conditions often extended 'several weeks' " (Br. in Opp. 3 (quoting Pet. App. 47a-48a)). Rather, the district court observed at the preliminary injunction stage that "[e]vidence presented indicates" that such delays took place under the cumbersome procedure in effect before 1983 (Pet. App. 47a-48a)—a procedure that the challenged regulation abolished.

Fourth, respondents again err in stating that in 1983 INS "began admitting all arrested persons to bail only upon condition they not work" (Br. in Opp. 5). INS never began implementation of 8 C.F.R. 103.6(a)(2), because its implementation was enjoined in this lawsuit at the same time it would have taken effect. And Section 103.6(a)(2) does not "admit[] all arrested persons to bail only upon condition they not work." Rather, it conditions the bail of arrested persons on their not engaging in *unauthorized* employment. Those arrestees who can show that they are citizens, or that they are bona fide applicants for asylum, or that they have preexisting work authorization, or that they meet the terms of 8

C.F.R. Pt. 109 authorizing district directors to grant work authorization, are not forbidden to work by any condition of their bonds. See Pet. 8-9, 17-18, 25.

Fifth, respondents contend that "[a]ny contribution bond conditions may have made [[to controlling unauthorized employment]—and the question petitioners propose—is now of little importance" (Br. in Opp. 8-9 (footnote omitted)). We disagree.

Contrary to respondents' assertion (Br. in Opp. 2), the IRCA—the 1986 Act—was not the first congressional manifestation of more than a "peripheral concern" with unauthorized alien employment. The Act has always prohibited unauthorized employment by undocumented aliens (8 U.S.C. 1182(a)(14)). Until the IRCA, however, the available means for enforcing that prohibition worked solely against the alien and solely by means of deportation. The challenged regulation was an effort on the part of INS to enhance its enforcement capability by adding a further disincentive for aliens to engage in unauthorized employment.

Concerned that the enforcement efforts of the unauthorized-employment prohibition were not effectively stemming the tide of illegal immigration, Congress added another dimension of enforcement ability in the IRCA by providing sanctions against employers. The legislative history of the IRCA reflects Congress's belief that "most undocumented aliens enter this country to find jobs" (H.R. Rep. 99-682, 99th Cong., 2d Sess. Pt. 1, 47 (1986)), and its longstanding concern with controlling illegal immigration by reducing employment incentives (*id.* at 52, 56, 104-105, 109). See also S. Rep. 99-132, 99th Cong., 1st Sess. 1, 8 (1985). Moreover, despite respondents' attempt to disparage the adverse impact

of unauthorized alien employment on the domestic work force (Br. in Opp. 6 n.5, 9 n.10), the legislative history reflects Congress's continuing belief that such an adverse impact exists. See H.R. Rep. 99-682, *supra*, at 47 (expressing particular concern with unemployment among "minority groups with whom undocumented workers compete for jobs most directly"); *id.* at 52, 53.

The availability of employer sanctions as an additional enforcement technique does not undermine the importance of the underlying question in this case, namely the scope of the Attorney General's discretion in devising other techniques to enforce statutory prohibitions on unauthorized alien employment.[4] Rather, the employer sanction provisions emphasize once again that Congress has long been concerned with alien employment and show that the concern remains so strong that Congress chose to enact additional methods for enforcing the statute's employment pro-

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[4] There is no basis for respondents' contention (Br. in Opp. 9 n.10) that through the IRCA Congress "[c]oncurr[ed]" in the decisions below, which are not discussed in the legislative history of the IRCA. There was no need for Congress to include specific bond conditions in the IRCA since the Immigration and Nationality Act already contained a bond provision (8 U.S.C. 1252(a)) that Congress, in its own words, understood to give the Attorney General "untrammeled authority to impose such conditions or terms as he sees fit in releasing an alien under bond * * * pending final determination of the deportability of the alien" (H.R. Rep. 1192, 81st Cong., 1st Sess. 6 (1949); S. Rep. 2239, 81st Cong., 2d Sess. 5 (1950)), and a general provision (8 U.S.C. 1103) from which, as the First Circuit recently observed, "it is readily apparent that Congress has invested the Attorney General with vast discretion anent immigration matters" (*Amanullah* v. *Nelson*, 811 F.2d 1, 5 (1987)).

hibitions without in any way repealing the federal enforcement methods already in existence.[5]

Nor is there reason to believe that employer sanctions are a complete answer to the problem of unauthorized employment, making all other enforcement mechanisms superfluous. The employer sanctions will not even become fully operational until the IRCA has been in effect for 18 months (see IRCA § 101 (adding Immigration and Nationality Act § 274A(i)(1)(B), (i)(2)), 100 Stat. 3368-3369 (to be codified at 8 U.SC. 1324A)), and at present one can only speculate as to how efficacious they will be. In any event, the existence of employer sanctions will not make no-unauthorized-work bond conditions superfluous, any more than the existence of the criminal code makes it superfluous to include provisions forbidding violations of the criminal law in the release bonds of persons arrested for criminal offenses (see Pet. 21 n.13). The IRCA provides no reason to deny review in this case.[6]

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[5] Respondents have misconstrued the intent of Congress in preserving certain labor protections for alien workers (Br. in Opp. 16-17). As we explained in the petition (at 27-29), applying labor protections to undocumented employees serves as a disincentive for employers to hire such workers with the concomitant expectation that the demand for such workers will decrease and ultimately the flow of illegal immigration will decline. Indeed, in H.R. Rep. 99-682, *supra*, at 58, Congress specifically endorsed the rationale of *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 893 (1984), as discussed in the petition (at 15-16 and 29). Moreover, in preempting state laws concerning regulation of alien employment (see Pet. 28-29 n.18), Congress expressed no intention to repeal existing federal law, including the INS regulation at issue here.

[6] Contrary to respondents' assertion (Br. in Opp. 2), it is extremely likely that the courts below would adhere to their prior rulings if asked to rule again on the issue in light of the

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APRIL 1987

IRCA, since both courts expressly (and incorrectly) held that the *only* permissible bond conditions are those related to ensuring appearance at deportation proceedings (Pet. App. 7a, 18a-19a, 22a-23a). Review by this Court is therefore appropriate at this time. Moreover, if respondents were correct in suggesting that the basis for the judgment below has been undercut by the IRCA, the appropriate course would be to vacate the judgment below rather than to deny certiorari.

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